

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Section 257 Triennial Report to Congress)
Identifying and Eliminating)
Market Entry Barriers)
For Entrepreneurs and Other)
Small Businesses)

REPORT

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By the Commission: Chairman Genachowski and Commissioner Clyburn issuing separate statements;
Commissioner Copps concurring in part and issuing a statement.

TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION AND EXECUTIVE SUMMARY	1
II. EXECUTIVE SUMMARY	
A. The Office of Communications Business Opportunities.....	
B. International Bureau.....	
C. Wireless Telecommunications Bureau.....	
D. Wireline Competition Bureau	
E. The Office of Engineering and Technology.....	
F. Media Bureau.....	
G. Consumer & Governmental Affairs Bureau	
H. Enforcement Bureau	
III. REGULATORY ACTIONS.....	
A. Office of Communications Business Opportunities.....	6
1. Regulatory Flexibility Act and Small Business Act Initiatives	7
2. Small Entity Compliance Guides	8
3. Ten-Year Review of Rules (Section 610 Review)	9
4. Special Small Business Size Standards	10
5. Unified Agenda of Federal Regulatory and Deregulatory Actions	11
6. Office of the National Ombudsman.....	12
7. White House Initiative on Asian Americans and Pacific Islanders	13
8. Broadband Workshop on Small and Disadvantaged Businesses.....	18
9. Advisory Committee on Diversity.....	21
10. FCC Diversity Order	22
11. Meetings and Conferences	23
B. International Bureau.....	24
1. Streamlining Earth Station Licensing.....	25
2. Streamlining 214 Procedures.....	27
3. Spectrum.....	29
4. Electronic Filing Initiatives	31
5. Satellite Licensing	33
C. Wireless Telecommunications Bureau.....	35
1. Bidding Credits for Broadband Radio Service	35

2.	Allowing Smaller Antennas in the 11 GHz Band.....	36
3.	Accommodating Broader Bandwidth Channels in the 6 MHz Band.....	38
4.	Antenna Structure Lighting Inspection.....	42
5.	700 MHz Second Report and Order	43
6.	Roaming	46
7.	Hearing Aid Compatibility	48
8.	Historic Preservation Review	50
9.	Transition to 6.25 kHz Technology Delayed.....	53
10.	More Efficient and Flexible Spectrum Use for Part 90 Licensees	55
11.	Domestic Implementation of Automatic Identification Systems (AIS).....	57
12.	Site-Based Licensing Retained for Business and Industrial Land Transportation	58
13.	Rule Streamlining Extended to Benefit Advanced Wireless Services (AWS) and Personal Communications Services (PCS).....	59
14.	Information Provided on Auction and Licensing Processes.....	60
15.	Recent Auctions and Provisions for Small Businesses.....	61
16.	The Auction Process.....	65
17.	700 MHz Proceeding and 700 MHz Auction	68
18.	Rural Broadband Outreach	72
D.	Wireline Competition Bureau	74
1.	Network Management and the Open Internet.....	75
2.	Local Number Portability	77
3.	Customer Privacy/CPNI.....	81
4.	911 Service	82
5.	Interconnection.....	84
6.	Multi-Tenant Environments	87
7.	Universal Service.....	88
a.	Call Home Act Implementation	90
b.	High Cost Support.....	92
(i)	ETC Designation	92
(ii)	Interim Cap Orders.....	94
(iii)	High-Cost Waivers	97
8.	Special Access	98
E.	Office of Engineering and Technology.....	100
1.	Mutual Recognition Agreements.....	101
2.	Electronic Equipment Authorization	102
3.	Knowledge Data Base (KDB)	103
4.	Ultra-Wideband Technology	104
5.	New Uses for the TV Broadcast Band.....	105
6.	Broadcast Auxiliary and Mobile Satellite Services at 2 GHz.....	106
7.	Wireless Operations in the 3650-3700 MHz Band.....	107
8.	Medical Device Radio Communication Service	108
9.	Medical Body Area Networks	109
10.	Spectrum Sharing Innovation Test-Bed	110
11.	Summary.....	111
F.	Media Bureau.....	112
1.	Promoting Ownership Diversity.....	113
2.	Exclusivity Clauses in the Provision of Video Services to Multiple Dwelling Units	117
3.	Competition in the Video Distribution Market.....	119
4.	Digital Audio Broadcasting.....	121
5.	Policies to Promote Rural Radio Service	122
6.	Video Competition Notice of Inquiry.....	123
7.	XM-Sirius Merger	126

8. Low Power Radio Service	129
9. Localism	132
10. Leased Access Programming.....	135
G. Consumer & Governmental Affairs Bureau	136
1. Slamming.....	136
2. Telecommunications Relay Service	138
a. Commission Certification of New IP-Based Relay Providers	138
b. Provider Compensation from the TRS Fund.....	140
c. Application of E911 Regulations to TRS Providers	143
3. Application of Section 255 to Interconnected VoIP Services	144
4. Closed Captioning	145
5. Market Entry in Indian Country	147
H. Enforcement Bureau	149
1. Complaint Mediation.....	150
2. Pole Attachments.....	151
3. Investigations.....	152
4. Forfeitures.....	153
IV. LEGISLATIVE PROPOSALS	154
1. New Tax Incentive Program.....	155
V. CONCLUSION	156

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Section 257 of the Communications Act of 1934, as amended (Communications Act)¹ mandates that, every three years, the Commission review and report to Congress on (1) efforts to identify and eliminate regulatory barriers to market entry in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services by entrepreneurs and other small businesses and (2) proposals to eliminate statutory barriers to market entry by those entities, consistent with the public interest, convenience, and necessity.²

2. The purpose underlying the requirements contained in Section 257 are:

To promote the policies and purposes of this [Communications] Act favoring a diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.³

3. In this 2009 Section 257 Report to Congress (*2009 Report*), we examine regulatory actions taken to reduce market entry barriers by each rulewriting Bureau and Office within the

¹ 47 U.S.C. § 257. Congress added Section 257 to the Communications Act through the Telecommunications Act of 1996, Public Law No. 104-104, 110 Stat. 56 (1996) (Telecommunications Act of 1996).

² 47 U.S.C. § 257 (c). Subsection (c) requires periodic review and reporting by the Commission every three years. The Commission's last report covered years 2004 through 2006, and was adopted and released in 2007. *See* Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, 22 FCC Rcd 21132 (2007).

³ 47 U.S.C. § 257(b).

Commission since the last triennial report.⁴ We also make recommendations for legislative action to reduce statutory barriers to market entry.

4. In addition, as our mandate requires, we also identify other barriers which, if not addressed, have the potential to limit market entry by entrepreneurs and other small businesses. One such barrier is a general lack of data on minority participation, which could inform decisions and help the Commission gauge the effectiveness of its actions on an ongoing basis. Another barrier is a lack of outreach to the very parties who could benefit from agency actions. While the actions described in this report do not curtail these barriers, it is important to recognize them so that they may be addressed in the future.

5. The Commission fully recognizes the role that small communications businesses play in a robust American economy. Our efforts, as detailed in this *2009 Report*, evidence the Commission's commitment to identifying and reducing or eliminating barriers that would impede the growth of such a vital sector of the industry and the economy. This *2009 Report* contains information from each Bureau and Office that either conducts substantive rulemakings relevant to small businesses or that is directly engaged in advocating for regulatory policies, rules and regulations to support small businesses. Below is an Executive Summary of the regulatory actions taken in the last three years by the Commission's rulewriting Bureaus and Offices to reduce market entry barriers.

II. EXECUTIVE SUMMARY

A. The Office of Communications Business Opportunities

- Served as the principal small, women, and minority business policy advisor to the Chairman and Commissioners, Bureaus and Offices.
- Developed policies, plans and programs to further the competitive concerns of small entities.
- Ensured that small entities obtained an opportunity to participate in any applicable rulemakings by organizing meetings, distributing information and attending conferences.
- Managed the implementation of the Regulatory Flexibility Act (RFA), the Small Business Act, Section 257 of the Telecommunications Act of 1996, and the Small Business Regulatory Enforcement Fairness Act (SBREFA).
- Acted as the Commission's liaison with the Small Business Administration (SBA) and assisted in coordinating special small business size standards with the SBA.
- Reviewed Notices of Proposed Rulemakings, Reports and Orders and other notice and comment items for Commission action to ensure compliance with the requirements of the RFA and SBREFA.
- Solicited information, on a semi-annual basis, related to Commission rulemaking proceedings for inclusion in the Unified Agenda, which is published by the General Services Administration (GSA), and coordinated the submission of the description of the Commission's current rulemaking proceedings to the GSA.

⁴ Subsection (c) of Sec. 257 requires the Commission to review and report on the regulatory actions taken to identify and eliminate market entry barriers during the preceding three-year period. The Commission's most recent report detailed actions taken for the period ending December 31, 2006. Accordingly, this 2009 Report provides a review of regulatory actions taken by the Commission for the three-year period ending December 31, 2009. We also note 2010 Commission actions or court decisions in footnotes insofar as they relate to actions taken by Bureaus or Offices between 2007 and 2009.

- Reviewed Small Entity Compliance Guides (SECGs), pursuant to Section 212 of SBREFA, which summarize, in plain language, rules or groups of rules containing compliance requirements adopted by the Commission. Also, coordinated the publication of SECGs on the FCC's website and drafted the annual Reports to Congress on this program.
- Coordinated the compilation of information concerning existing 10-year old rules that are subject to review pursuant to Section 610 of the RFA, and drafted the *Federal Register* publications of the lists of such rules for public comment on the need for their continuation, modification or elimination. OCBO also assisted the Bureaus and Offices in resolving comments filed in response to the publication of the Section 610 list of rules.
- Provided internal training, advice, and guidance on matters relating to the requirements of the RFA and SBREFA, including the hosting of Reg Flex clinics for rulewriters.
- Participated in the FCC's Advisory Committee on Diversity for Communications in the Digital Age.
- Distributed information on FCC rules, policies and initiatives affecting small, women- and minority-owned businesses, maintained and updated OCBO website, attended conferences held by organizations representing OCBO constituencies.
- Began implementation of provisions of FCC's Diversity Order with regard to creating a Guide to Diversity to be entitled "Increasing Diversity in the Media and Telecommunications Industries."
- Hosted a workshop entitled "Opportunities for Small and Disadvantaged Businesses" which was part of a series of workshops held to promote a new dialogue between the FCC and key constituents on matters important to the development of the National Broadband Plan.
- Met with trade groups and small businesses to discuss the impact of certain agency rules and regulations, such as the designated entities rules.

B. International Bureau

- Continued to streamline earth station licensing, directly benefitting the thousands of small businesses dependent on such stations.
- Continued to implement streamlined international Section 214 authorization process, which lowers costs, eliminates delays in the authorization of entry, increases the availability of capital by eliminating unnecessary limits on foreign investment, and reduces reporting burdens.
- Engaged proactively with other countries to make spectrum available, both through new allocations and through technical and regulatory solutions, for small businesses interested in innovative telecommunications enterprises.
- Continued improvements to consolidated licensing and application processing system, which is designed to lower costs for applicants and thereby lower barriers to entry for small businesses.

C. Wireless Telecommunications Bureau

- Relicensed unassigned Broadband Radio Service Basic Trading Area licenses and adopted competitive bidding rules for BRS by establishing discounts on winning bids placed by small designated entities based on their average annual gross revenues over the past three years.
- Permitted the installation of smaller antennas by Fixed Service (FS) operators which reduced the minimum antenna diameter, while protecting other users from experiencing any greater interference than they would otherwise have experienced from systems using larger antennas.
- Proposed to increase the number of channel pairs eligible for conditional authorizations in the 23 GHz band allowing applicants to put spectrum to use more quickly.

- The 700 MHz Band spectrum was made available for other wireless services, including public safety and commercial services, as a result of the digital television (DTV) transition. The Commission revised the 700 MHz band plan improving the opportunity for small entities to obtain valuable wireless spectrum by providing smaller licensing areas that better meet the needs of small entities, while avoiding the transaction costs associated with obtaining access to spectrum in the secondary market.
- The Commission replaced the “substantial service” requirements for the 700 MHz Band commercial licenses with significantly more stringent performance requirements in order to promote the provision of innovative services to consumers throughout the license areas, including in rural areas. Additionally, the keep-what-you-use rule ensured that spectrum covering areas that are not adequately built out is returned to the Commission and others are given an opportunity to acquire licenses for this spectrum.
- Promoted innovation in the 700 MHz spectrum band by imposing certain conditions on the 700 MHz C Block to provide open platforms for devices and applications.
- Implemented specific auction procedures to improve the opportunity for small businesses to successfully bid on 700 MHz Band licenses by adopting anonymous bidding procedures for the auction of the 700 MHz licenses.
- Adopted a Roaming Report and Order finding that roaming is a common carrier obligation for CMRS carriers and that CMRS carriers are required to provide, under reasonable and nondiscriminatory terms and conditions, automatic roaming services, upon reasonable request, to any requesting technologically compatible CMRS carrier outside of the requesting carrier’s “home market”. The Commission also adopted a Roaming Further Notice of Proposed Rulemaking seeking comment on whether an automatic roaming obligation should be extended to data services that are classified as information services and services that are not CMRS.
- Updated wireless hearing aid compatibility rules to enhance the ability of persons with hearing disabilities to access digital wireless telecommunications by including new deployment requirements that permit manufacturers and service providers to offer either specified numbers or percentages of handset models that meet hearing aid compatibility standards. Under the percentage option, small manufacturers are relieved of the expense of having to offer a number of compatible hearing aid models required of larger competitors thus allowing small businesses to maintain a competitive foot-hold in this industry.
- Introduced the Electronic Section 106 (E-106) System to facilitate and improve compliance with the process required under the National Preservation Act. The E-106 System permits licensees and applicants electronically to submit the forms required under the NPA to State Historic Preservation Officers, federally recognized Indian Tribes, Native Hawaiian organizations (NHOs), and other consulting parties.
- Continued administration of the Tower Construction Notification System (TCNS). TCNS allows tower constructors electronically to identify and initiate communications with Tribes and NHOs that have asserted a traditional religious and cultural interest in historic properties within the geographic area of a proposed tower.
- Continued to identify those antenna structures that might affect air navigation, consistent with recommendations made by the Federal Aviation Administration (FAA), and for registering such structures with the Commission. The Commission required owners of antenna structures to register with the Commission those structures that meet the registration criteria and to exercise primary responsibility for the prescribed painting and lighting. Registration has been streamlined to allow small business owners to undertake this function and avoid the cost associated with hiring outside consultants to perform this simplified task.

- Delayed the implementation of requiring certain PLMR licensees to transition to a more spectrum efficient, 6.25 kHz technology. The delay provides significant relief to equipment manufacturers and users, large and small alike, from the potentially excessive costs and burden that the original compliance date may have produced.
- Adopted measures for the domestic implementation of Automatic Identification Systems (AIS), an advanced marine vessel tracking and navigation technology that can significantly enhance the Nation's homeland security as well as maritime safety. This measure allows small commercial vessels to avoid the expense of having to outfit their ships with more than one AIS device if they travel outside the U.S. territorial waters.
- Retained the current site-based licensing paradigm for the 199 channels allocated to the Business and Industrial Land Transportation (B/ILT) Pool in the 896-901 MHz/935-940 MHz (900 MHz) band finding that the adverse effects of changing the licensing system on all current and future licensees in this service, and particularly small businesses, were too great.
- Took further steps to streamline and harmonize its rules related to Wireless Radio Services (WRS) by adopting modifications to the rules governing radiated power limits for Personal Communications Services (PCS) and Advanced Wireless Services (AWS).
- Provided information on auction and licensing processes to all sections of the wireless telecommunications community and the general public through trade show booths, a webpage and Auctions/ULS Hot Line, pre-auction seminars, and an Auction Support telephone line.
- Conducted eleven spectrum auctions and, in all but one auction, offered bidding credits to participants in auctions of wireless licenses who qualified as a small business or participants in auctions of broadcast construction permits who qualified as a new entrant.
- Has continued to adopt band plans that address the needs of smaller businesses for different types of spectrum blocks and geographic license areas by designating a mix of geographic areas and spectrum block sizes, including spectrum for licensing over smaller and rural geographic areas.
- Facilitated the participation of small businesses in the provision of spectrum-based services through its implementation and enforcement of improved rules governing these "designated entities" to better deter unqualified entities from attempting to circumvent eligibility requirements.
- Used a web-based auction application filing and auction bidding system (the Integrated Spectrum Auction System or "ISAS") that facilitates participation in its spectrum auctions by a wide range of potentially qualified applicants in a user-friendly bidding environment for auction participants. As a service to auction participants, an Auction Support telephone line was available to assist with auction-specific questions during the course of auction events. Telephonic bidding also enhanced the accessibility of the auction bidding system to individuals with disabilities.
- Continued to make considerable efforts to reach out and provide information to rural America, including entrepreneurs and other small businesses, through a Joint Federal Rural Outreach Initiative. This initiative has created a partnership between the Commission's Wireless Telecommunications Bureau and the U.S. Department of Agriculture's Rural Utilities Service (now Rural Development) to assist rural America. As part of this initiative, the FCC and USDA launched an on-line resource for those in rural America looking to bring the benefits of broadband services to their communities.
- In conjunction with USDA, conducted four regional, day-long educational workshops on rural broadband in different locations across the country during 2008. The workshops provided rural communities and organizations with information on FCC and USDA resources, including the broadband funding opportunities from USDA and information on broadband technologies, policies, and spectrum access from the FCC.

D. Wireline Competition Bureau

- Launched a rulemaking to determine whether Commission rules would be necessary to preserve a free and open Internet. The rulemaking proposed rules requiring, *inter alia*, that broadband providers adhere to non-discrimination and transparency principles intended to lower barriers to entry by online content, application, and service providers.
- Clarified rules addressing delays in and obstruction of the Local Number Portability (LNP) process.
- Extended the LNP obligations to interconnected Voice over Internet Protocol (VoIP) providers.
- Clarified rule that providers may not use proprietary information of other carriers that they receive in the local number porting process.
- Adopted rules implementing provisions of the NET 911 Act, to ensure that interconnected VoIP providers have access to any and all capabilities they need to provide 911 and enhanced 911 service in full compliance with Commission's rules, and that no entity may use customer information obtained as a result of the provision of 911 services for marketing purposes.
- Affirmed that Section 251 of the Communications Act entitles competitive local exchange carriers to interconnect with incumbent local exchange carriers for the purpose of exchanging traffic on behalf of VoIP providers.
- Clarified that interconnection rights, under Section 251, are not based on the identity of the requesting carrier's customer.
- Adopted the *Competitive Networks Order* prohibiting carriers from entering or enforcing contracts that would make them the exclusive provider of telecommunications services in a residential multiple tenant environment.
- Granted forbearance to exempt from USF and Telecommunications Relay Services fund contribution requirements revenue from calls covered by section 2(a) of the Call Home Act, including, but not limited to, calls made using prepaid calling cards and post-paid calling cards, and collect calls made by Armed Forces Personnel.
- Adopted an interim emergency cap on the amount of high-cost support available to competitive eligible telecommunications carriers (ETCs), including a limited exception to this cap for competitive ETCs serving Tribal Lands or Alaska Native regions.
- Granted petitions for ETC designation on Tribal reservations.
- Granted several waivers of the Commission's high-cost rules, including the extension of relief to small, rural carriers.
- Granted petitions to allow non-facilities based companies to become designated as limited ETCs for the purpose of providing Lifeline universal service support.
- Sought comment on an appropriate analytical framework for examining issues raised in the Commission's special access proceeding.

E. The Office of Engineering and Technology

- Streamlined and simplified the authorization of equipment process.
- Promoted new and innovative services by entrepreneurs and other small businesses in the unlicensed spectrum market, including ultra-wideband technologies and "white spaces" devices that use the television broadcast spectrum on a secondary basis.

- Promoted new and innovative services by entrepreneurs and other small businesses in the licensed spectrum market, including mobile satellite services and ancillary terrestrial services at 2 GHz, wireless broadband services at 3650 MHz, and advanced medical services at 401-406 MHz and 2/5 GHz.
- Conducted studies to support and promote new technologies and greater use of spectrum, including a shared federal/non-federal Spectrum Sharing Innovation Test-Bed in the 400 MHz band.

F. Media Bureau

- Sought to foster greater competition in the market for providing video service to apartment and condo complexes, and other real estate developments by instituting a ban on exclusivity clauses in the provision of video services to multiple dwelling units.
- Adopted an *Order* extending the ban on exclusive contracts between vertically integrated video programmers and cable operators, ensuring competitive MVPDs access to cable operator affiliated programming thereby fostering viable competition in the video distribution market.
- Adopted new standards to facilitate the use of leased access channels on cable systems, providing an easier way for independent programmers to gain access to cable distribution.
- Allowed radio stations to time broker unused digital bandwidth to third parties, providing an opportunity for new entrants into the radio broadcast market.

G. Consumer & Governmental Affairs Bureau

- Adopted an order refining the requirements for verification of a consumer's intent to switch carriers. These rule changes help eliminate barriers to market entry by small telecommunications companies by decreasing the chance that they will lose customers to unauthorized carrier changes.
- Certified Internet Protocol-based TRS providers to become eligible for reimbursement from the Interstate TRS Fund.
- Sought comment on the closed captioning obligations of digital broadcasters that "multicast"; ultimate disposition of these issues likely will have an effect on market entry by small broadcasters.
- Conducted outreach to Tribal Nations on an ongoing basis, with emphasis on increasing telecommunications access and market entry in Indian Country.

H. Enforcement Bureau

- The Enforcement Bureau's Market Disputes Resolution Division assisted in resolving over sixty matters involving complaints with common carriers, including eighteen mediation sessions held at the Commission, obviating the need for costly litigation to small businesses and others.
- The Enforcement Bureau investigated and corrected anti-competitive and discriminatory business practices by telecommunications carriers that established barriers to entry by small businesses. This effort was accomplished through the use of forfeiture and other enforcement tools imposed on violators.
- The Enforcement Bureau resolved nine pole attachment complaint disputes during the period between January 2007 and December 2009 involving access denials to poles or higher rate payments for pole usage. The EB's efforts have allowed small businesses to compete effectively with their larger competitors.

III. REGULATORY ACTIONS

A. Office of Communications Business Opportunities

6. The Commission created the Office of Communications Business Opportunities (OCBO) in 1994 to promote business opportunities for entrepreneurs and other small businesses, including minority- and women-owned businesses. OCBO develops, coordinates, evaluates, and recommends to the Commission, policies, programs and practices that promote participation by small entities, women and minorities in the communications industry. Specifically, OCBO oversees the administration and implementation of the Commission's obligations under the Regulatory Flexibility Act (RFA),⁵ the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Small Business Act,⁶ and certain other statutes governing small business issues. OCBO's staff participates in conferences and seminars across the country to inform the public about relevant agency proceedings, policies, and initiatives. As part of the Commission's outreach to entrepreneurs and other small businesses, OCBO maintains an extensive database of approximately 3,000 small businesses to which it sends information regarding Commission rulemakings and orders, as well as new service opportunities. In addition OCBO meets with entrepreneurs and small businesses and representatives of trade organizations. OCBO maintains an internet site which contains vital information concerning Commission rulemakings and ownership opportunities for the small business community.

1. Regulatory Flexibility Act and Small Business Act Initiatives

7. OCBO implements the RFA and assists in the drafting of RFA analyses of all notice and comment rulemakings. OCBO works with Bureaus and Offices to ensure that RFA analyses are precise and helpful, including a focus on plain language. Major goals of the RFA include increasing agency awareness and understanding of the impact of proposed agency regulations on small entities, ensuring agency communication and explanation of any findings concerning such impacts, and encouraging regulatory flexibility and relief to small entities, where appropriate. With few exceptions, an RFA analysis (or, alternatively, a certification that no such analysis is warranted) is required for every federal rulemaking that requires public notice and comment. The analyses describe the need for the agency action, discuss alternatives the agency has considered, and describe which entities are considered "small" within the context of the rulemaking. In this last regard, OCBO assists the Bureaus and Offices in determining and describing the appropriate small business size standards for the various services regulated by the Commission. Overall, the commission's RFA work assists with educational outreach to small entities and results in greater small entity participation in rulemakings.

2. Small Entity Compliance Guides

8. Pursuant to Section 212 of SBREFA, the Commission is required to publish Small Entity Compliance Guides when it conducts a Final Regulatory Flexibility Analysis (FRFA) under Section 604 of Title 5 of the U.S. Code.⁷ Congress enacted Section 212 to benefit small businesses, non-profits, and small governmental jurisdictions (with staffing or populations fewer than 50,000) by giving them concrete, easily understandable guidelines for compliance. In 2004, the OCBO coordinated the Commission's initiation of a Compliance Guide Program.⁸ The program is designed to implement Section 212 of the SBREFA by publishing documents that explain in plain language the actions a small

⁵ See generally 5 U.S.C. §§ 601-612.

⁶ Small Business Act, 15 U.S.C. § 632.

⁷ Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) is a part of Title II of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 857 (1996).

⁸ The Commission has long produced Fact Sheets and other informative documents, some of which have served as Compliance Guides.

entity must take to comply with a rule or a group of rules. OCBO has drafted a Compliance Guide Manual which established internal agency policies and procedures for creating and publishing Compliance Guides in a timely manner. The agency publishes its compliance guides on its public website at www.fcc.gov/ocbo. For 2008 and 2009, OCBO also coordinated the new, annual Report to Congress concerning the compliance guide program.⁹ The report described the agency's Compliance Guide Program and also other educational outreach efforts such as information that can be found on the website and information that has been translated into various languages. The annual reports list the compliance guides published for the subject year.

3. Ten-Year Review of Rules (Section 610 Review)

9. Section 610 of the RFA requires agencies to publish annually in the *Federal Register* a plan for the periodic review of rules that have a significant economic impact on a substantial number of entrepreneurs and other small businesses.¹⁰ The Commission's compilation identifies numerous rules that might be amended or rescinded, if appropriate, in an effort to better serve the public interest. The Commission's record of compliance with this program remains among the top of the sixty or so federal agencies subject to Section 610. This effort yields comments from the public, which are directed to the pertinent Bureau and Offices for initial review. The agency may then choose to initiate Notices of Proposed Rulemaking for those comments warranting further action.

4. Special Small Business Size Standards

10. Generally, Federal departments and agencies that promulgate regulations that affect small businesses use the SBA's size criteria as they develop their regulations.¹¹ To ensure that our initiatives accurately target entrepreneurs and other small business participation in the telecommunications sector, OCBO works closely with the SBA's Office of Size Standards to obtain approval of any necessary new telecommunications small business size standards. To accomplish this, the Commission forwards to the SBA all descriptions and analyses of proposed size standards prior to the Commission's adoption of a *Notice of Proposed Rulemaking*, and, thereafter, sends the SBA additional comments and documentation at each stage of the rulemaking process. Near the end of the process, prior to final Commission consideration of the new size standard, the Commission sends a formal request for approval to the SBA Administrator.

5. Unified Agenda of Federal Regulatory and Deregulatory Actions

11. OCBO submits a Report for publication in the semi-annual Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda), which provides information to the public regarding Commission regulations under development.¹² The Unified Agenda has appeared in the *Federal Register* twice each year since 1983. It helps governmental agencies comply with their obligations under the RFA, other statutes, and Executive Orders. As a part of the Fall 2009 Unified Agenda, the Commission listed and described 145 ongoing rulemaking proceedings.¹³ These descriptions assist the public in becoming involved in the regulatory process, and aid the regulated community in complying with existing regulations.

⁹ "First Annual Report of Federal Communications Commission on the Agency's Program to Produce Small Entity Compliance Guides" (June 11, 2008); "2009 Annual Report of Federal Communications Commission on the Agency's Program to Produce Small Entity Compliance Guides" (May 27, 2009).

¹⁰ See 5 U.S.C. § 610.

¹¹ See 15 U.S.C. § 632.

¹² See 5 U.S.C. § 602. The Government Services Administration's Regulatory Information Service Center publishes the Unified Agenda in the Spring and Fall of each year.

¹³ See *Spring 2009 Unified Agenda* 74 Fed Reg. 22018 (May 11, 2009).

6. Office of the National Ombudsman

12. OCBO coordinates the Commission's responses to small entity-related enforcement matters with the SBA's Office of the National Ombudsman (Ombudsman). One avenue for assistance for small entities is the Ombudsman's written comment (complaint) procedure. Using a two-page Federal Agency Comment Form, a small business may submit to the Ombudsman any complaints, suggestions, or compliments concerning a federal agency's enforcement action. The Ombudsman then forwards the form, along with any other documentation, to the agency for review. OCBO is certified as the Commission's formal contact for this function. OCBO also annually attends one or more Ombudsman public hearings, during which OCBO describes the Commission's efforts to assist small entities with the Commission's enforcement programs. For instance, during 2007, OCBO attended a National Ombudsman hearing to discuss the nation's transition to digital television. Finally, OCBO, in coordination with the Enforcement Bureau, responds to any inquiries during the year and sends an annual letter to the Ombudsman describing the Commission's enforcement initiatives on behalf of small entities. Annually, the Ombudsman submits a report to Congress in which it describes the efforts of federal agencies, including the Commission.

7. White House Initiative on Asian Americans and Pacific Islanders

13. Executive Order 13339 was signed on May 13, 2004, extending the previous Executive Order which committed the Administration to increase opportunities and improve the quality of life for Asian Americans and Pacific Islanders (AAPIs) through greater participation in Federal programs where they may be underserved.¹⁴ To implement the Presidential mandate, the Executive Order designated the Secretary of the Department of Health and Human Services to initiate a federal Inter-agency Working Group (IWG). The IWG, which consists of representatives of thirty-four participating federal agencies, oversees the development of all federal policies and initiatives addressing AAPI populations, particularly with respect to the development of programs and services for underserved AAPI populations.¹⁵

14. OCBO's Director is the Commission's representative to the IWG. A separate group, the Coordinating Committee (CC), was created to implement the policies and programs designed by the IWG. The CC consists of staff members selected from each of the thirty-four currently involved federal departments and agencies.

15. Given our mission to promote business opportunities in telecommunications, we have focused our efforts on promotion of AAPI economic and community development with regard to telecommunications issues. We seek to cooperate with other agencies that are interested in using telecommunications technologies to provide business-related information services, and other services, to rural, remote, and otherwise underserved populations. On September 29, 2006, we participated in the first ever White House Initiative on Asian American and Pacific Islanders (WHIAAPI) DC Summit, which was designed to offer opportunities for participants to network, compare best practices, and increase their capacity to serve AAPI communities. Since its inception, WHIAAPI has conducted 15 community site visits and 8 technical assistance conferences across the country.

16. OCBO's expanded contact with the national AAPI community proved helpful also in OCBO's sponsorship of, and preparation for, its August 18, 2009 Broadband Policy Workshop for Small and Disadvantaged Businesses. That Workshop convened panels in which leading micro-economists, broadband policy analysts, business strategists; and existing organizations with a lengthy track record of activity in broadband-based business operations; and new-entrant entrepreneurs seeking to use broadband technology to launch new businesses; all shared their perspectives and experiences and also commented

¹⁴ Executive Order, No. 13339 (Bush Executive Order). President Clinton signed the underlying Executive Order, No. 13125, on June 7, 1999, and President George W. Bush signed the previous Executive Order 13216 on June 6, 2001.

¹⁵ *Id.*

on ways to optimize federal broadband policy, including new broadband policy initiatives recently undertaken by the FCC. An Asian -American policy analyst was a full participant on the economics-and-business strategy panel.

17. Approximately 50 AAPI organizations, which were determined to be active in the communications industry and/or in community-level business development impacted by broadband policy, were invited either to send representatives to attend the workshop or to view the live webcast of the proceedings of the conference.

8. Broadband Workshop on Small and Disadvantaged Businesses

18. OCBO conducted two broadband workshops focused on the interests of small and diverse communications businesses in the national broadband effort. The first, entitled “Opportunities for Small and Disadvantaged Businesses (SDBs)” was conducted in August of 2009. The second, entitled “Capitalization Strategies for Small and Disadvantaged Businesses in Telecom and Broadband” was conducted in November of 2009.

19. The August 2009 workshop was designed to explore challenges faced by SDBs in adopting and utilizing new and existing broadband technologies, and to assist in developing a full record for preparation of the National Broadband Plan. The workshop included a number of panelists who discussed what is currently known about broadband technology in their constituent communities, and how the FCC, through the implementation of the National Broadband Plan, can assist SDBs in their effort to increase broadband usage. The panelists also discussed the various ways they help businesses grow by using broadband technology. They stressed the need for nationwide digital literacy and how broadband must become relevant in the daily lives of people in unserved and underserved communities. Some of the panelists were entrepreneurs who currently own and operate small businesses and described how broadband technology is being used to remain competitive in their industries.

20. The November 2009 capitalization strategies workshop was designed to educate small and diverse businesses in telecommunications and broadband on the myriad of financing opportunities available to them from both public and private sources and how to access these funding streams so as to remain active, productive, and profitable, in the telecommunications and broadcast industries. The workshop included representatives from NTIA, RUS, SBA, and various private investors. The panelists also met in one-on-one sessions with entrepreneurs to critique their presentations and business plans.

9. Advisory Committee on Diversity

21. The mission of the Federal Advisory Committee on Diversity for Communications in the Digital Age “Diversity FACA” is to make recommendations to the FCC regarding policies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries. OCBO participated by assisting the work of the Diversity FACA Subcommittees in preparing agency recommendations. The Diversity FACA met several times each year throughout the past three years and put forth numerous recommendations. Some of their recommendations were adopted and implemented by the FCC, such as revising attribution rules, extending build-out periods, and creating a Guide to Diversity, as more fully described below.

10. FCC Diversity Order

22. The Commission, in *In the Matter of Promoting Diversification of Ownership In the Broadcasting Services et al.*, (“Diversity Order”),¹⁶ adopted a number of proposals to encourage ownership diversity and enhance the participation of small businesses, including women- and minority-owned businesses in the broadcasting industry. In addition, the Diversity Order included a *Third Further Notice of Proposed Rule Making* (“Further Notice”), which sought comment on additional proposals to

¹⁶ *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922 (2008).

increase participation of small businesses, including women- and minority-owned businesses in the industry. One of the proposals adopted in the Diversity Order was the creation of a Guidebook to Diversity (“Guidebook”). The purpose of the Guidebook is to focus on ways in which companies can promote diversity in ownership and contracting. OCBO has been working, with input from members of the Diversity FACA, to prepare a draft of the Guidebook. Other actions adopted in the Diversity Order which were recommended by the Diversity FACA include: changing construction permit deadlines to allow “eligible entities” that acquire expiring construction permits additional time to build out the facility; revising the Commission’s equity/debt plus (“EDP”) attribution standard to facilitate investment in eligible entities; modifying the Commission’s distress sale policy to allow a licensee – whose license has been designated for a revocation hearing or whose renewal application has been designated for a hearing on basic qualifications issues – to sell its station to an “eligible entity” prior to the commencement of the hearing; adopting a rule that bars race or gender discrimination in broadcast transactions; requiring broadcasters to certify that their advertising sales contracts contain nondiscrimination clauses as a prerequisite to license renewal; giving priority to any entity financing or incubating an eligible entity in certain duopoly situations; and encouraging cooperation between the Commission and the Small Business Administration (SBA) to educate local and regional banks about SBA-guaranteed loan programs in order to facilitate broadcast and telecommunications-related transactions. In April 2008, the Commission held the first in a series of Access to Capital seminars for small communications businesses and new entrants. In November 2009, OCBO hosted a second access to capital seminar, discussed above in Section 9, which included advisors from both government and private sectors.

11. Meetings and Conferences

23. OCBO acts a liaison between the Commission and various trade organizations representing small, women- and minority-owned communications businesses. OCBO meets in-house with entrepreneurs and trade group representatives to better understand the challenges that they face. OCBO’s role within the Commission is to help these entities navigate the administrative processes within the agency and to ensure that their comments are considered in agency proceedings. OCBO is also a regular participant in conferences held by such groups as: American Women in Radio and Television; American Cable Association; U.S. Hispanic Chamber of Commerce; National Association of Black Owned Broadcasters, National Council of La Raza; and Minority Media Telecommunications Council, among others.

B. International Bureau

24. In the three year period covered by this report, the International Bureau acted in several areas to remove barriers to entry for small businesses or initiated Commission action to remove such barriers. First, the Bureau continued its efforts to streamline earth station licensing, which benefits thousands of small businesses dependent on such stations. Second, the Bureau continued streamlining the international Section 214 process, lowering costs and eliminating delays in the authorization of entry, increasing the availability of capital by eliminating unnecessary limits on foreign investment, and reducing reporting burdens. Third, through participation in International Telecommunication Union (ITU) activities, the Bureau led the Commission’s proactive engagement with other countries to make spectrum available for small businesses interested in innovative telecommunications enterprises. The Commission achieves this through the pursuit of new allocations as well as technical and regulatory solutions that promote efficient spectrum use. Fourth, the Bureau continued to improve its consolidated licensing and application processing system, which is designed to lower costs for applicants, and thereby lower barriers to entry for small businesses. Fifth, the Bureau continued its implementation of previously-adopted safeguards to ensure that satellite licensees remain committed and able to construct and launch their licensed satellites, resulting in new service to customers, including small businesses.

1. Streamlining Earth Station Licensing

25. Thousands of small businesses in the United States are “earth station” operators. Earth stations are antennas that transmit information to and receive transmissions from satellites. During the

past three years, the Commission has continued to reform and streamline the licensing process for satellite earth stations.¹⁷ Many of these reforms were designed to streamline the licensing procedures for "non-routine" earth station applications. These earth stations are often used to provide broadband Internet access services. Thus, these reforms facilitate the process by which entities, including small businesses, enter the market to provide broadband Internet access services. This, in turn, increases competition in the market for broadband Internet access services, which benefits all the consumers of such services, including small business customers.

26. In 2005, the Commission issued a *Notice of Proposed Rulemaking*, to consider rule revisions that would increase the number of earth station applications eligible for "routine" processing.¹⁸ These revisions were adopted in October 2008.¹⁹ Under the new rules, small antenna earth stations and earth stations operating with higher powers may now be eligible for routine processing in certain circumstances. These reforms allow companies, including small businesses, to provide innovative services to customers, including small business customers, in a timelier manner than previously possible.

2. Streamlining 214 Procedures

27. Over the years the Commission has implemented numerous streamlining procedures to reduce administrative regulatory barriers to entry into the U.S. *international* telecommunications service market, many of which benefit small businesses. In particular, in 2004, as part of the 2002 Biennial Regulatory Review process,²⁰ the Commission took steps to remove unnecessary burdens on international carriers by seeking comment on several potential changes to the international section 214 authorization process and to the rules relating to the provision of U.S.-international telecommunications services.²¹

28. In 2007, the Commission amended its rules to: (1) revise the procedures for discontinuance of an international service; (2) clarify that U.S.-authorized resale carriers can resell the U.S.-inbound international services of either U.S. carriers or foreign carriers; and (3) amend the ownership and other rules to clarify their intent.²² These amendments streamline the rules that apply to all carriers, including small businesses.

3. Spectrum

29. Wireless mobile telecommunications in the U.S., aided by the on-going joint efforts of industry and government, are developing into global systems. Higher capacity systems, with enhanced and more flexible service capabilities, continue to develop. Demand for these devices continues to escalate, and when coupled with the growing attractiveness of new high performance features, spectrum becomes an even more precious commodity. Internationally, within the schedule of ITU activities, the

¹⁷ For a discussion of prior efforts to streamline the earth station licensing process, see *Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, Report, 19 FCC Rcd 3034, 3057-58 (2004) (*2003 Triennial Review Report*); *Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, Report, 22 FCC Rcd 21144-45 (2007) (*2006 Triennial Review Report*).

¹⁸ *Part 25 Sixth Report and Order and Third Further Notice*, 20 FCC Rcd at 5621.

¹⁹ *2000 Biennial Regulatory Review -- Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations*, Eighth Report and Order, IB Docket No. 00-248, 23 FCC Rcd 15099, 15101-02 (2008) (*Part 25 Eighth Report and Order*).

²⁰ *2002 Biennial Regulatory Review*, GC Docket No. 02-390, 18 FCC Rcd 2726 (2003).

²¹ *Amendment of Parts 1 and 63 of the Commission's Rules*, IB Docket No. 04-47, Notice of Proposed Rulemaking, 19 FCC Rcd 4231 (2004).

²² *Amendment of Parts 1 and 63 of the Commission's Rules*, IB Docket No. 04-47, Report and Order, 22 FCC Rcd 11398, (2007).

Commission works with other agencies to find additional spectrum for licensed and unlicensed, domestic and global wireless services. Additional spectrum utilization opportunities can arise either through efficiencies brought about by further advances in technology, *i.e.*, by compressing existing user requirements into less bandwidth, or by the allocation of additional spectrum via domestic or global allocation processes. The International Bureau coordinates many activities using both approaches.

30. In particular, the Commission works closely with terrestrial and satellite wireless industry representatives preparing and attending ITU, the World Radiocommunication Conference (WRC) and study groups in the radio communication, telecommunication, and development sectors. The WRC was held in 2007 and addressed, among other issues, spectrum allocations for wireless broadband services, protection of satellite services, and spectrum for public safety services. At the World Telecommunications Standardization Assembly (WTSA), held in 2008, the FCC worked with industry to counter proposals to add a surcharge to mobile termination rates for calls from developed countries to developing countries. In addition, FCC staff worked with industry at working level meetings to develop standards and protection criteria for wireless and satellite services, to develop proposals for spectrum allocations, and to promote studies on the use of wireless and satellite services to increase access to communications services in developing countries and to help in disaster preparedness and response. Experience proves that advances in technology and standardization ultimately lead to significant growth in small business opportunities, including export, whether it is in equipment design and manufacture, new software development, creative applications of existing intellectual property, or the provision of new services.

4. Electronic Filing Initiatives

31. To reduce paper filings and make use of new Internet technologies to improve processing efficiency, the International Bureau developed a consolidated licensing and application processing system known as the International Bureau Filing System (IBFS). Implementation of IBFS began in February 1999, facilitating the following applications and filings: (1) space station authorization and special temporary authority; (2) earth station authorization and special temporary authority; (3) space and earth station application for modification of current authorization; (3) Section 214 international authorization and special temporary authority; (4) cable landing license; (5) accounting rate change; (6) recognized operating agency; (7) international signaling point code; (8) request for data network identification code; (9) and foreign carrier affiliation notification filings.

32. Since its launch, IBFS has continued to evolve, tapping into advances in technology and web design. In particular, the voluntary filing of non-docketed comments and petitions and other non-application filings via the MyIBFS was added in 2008.²³

5. Satellite Licensing

33. In the *2006 Report*, the Commission discussed the satellite licensing reforms adopted in the 2003 *First Space Station Licensing Reform Order*.²⁴ The Commission noted that it had substantially revised its space station licensing procedures to expedite the space station licensing process and facilitate provision of satellite services to the public, including but not limited to small business customers.²⁵ As part of these reforms, the Commission adopted a package of safeguards designed to ensure that licensees remain committed and able to construct and launch their licensed satellites. One of those safeguards

²³ "International Bureau Announces New Filing Modules Within MyIBFS Electronic Filing System: Ability to File Additional Applications and Pleadings Electronically," *Public Notice*, DA 08-2173 (IB rel. Sept. 29, 2008).

²⁴ *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 02-34, 18 FCC Rcd 10760 (2003) (*First Space Station Reform Order*).

²⁵ *2006 Triennial Review Report*, 22 FCC Rcd at 21150.

requires licensees to meet a series of construction milestones set forth as conditions in their licenses. Failure to meet a milestone, without an extension for good cause shown, renders the license null and void by its own terms. The orbital location and/or spectrum then becomes available for reassignment.²⁶

34. During the period covered by this Report, 2007 to 2009, 12 satellites were launched and are now providing service to customers, including small business customers. Further, the Commission reviewed the milestone compliance demonstrations of each operator with licensed but unlaunched satellites, and cancelled licenses when warranted. Other licensees that decided not to proceed with implementation surrendered their licenses voluntarily. From 2007 through 2009, 11 satellite licenses were surrendered or cancelled. This made additional spectrum available for satellite operators willing and able to construct satellites and provide service to small business customers.

C. Wireless Telecommunications Bureau

1. Bidding Credits for Broadband Radio Service

35. In 2008, the Commission directed the Wireless Telecommunications Bureau to relicense unassigned Broadband Radio Service (BRS) Basic Trading Area (BTA) licenses.²⁷ In adopting competitive bidding rules for BRS, the Commission established discounts on winning bids placed by small business entities based on their average annual gross revenues over the past three years: a 15 percent discount for bidders with annual revenues between \$15 million and \$40 million, a 25 percent discount for companies with annual revenues between \$3 million and \$15 million, and a 35 percent discount for companies with annual revenues of \$3 million or less.²⁸ Pursuant to the Commission's direction, the Wireless Telecommunications Bureau conducted an auction of 78 BRS licenses in October 2009.²⁹ In Auction 86, five of the ten winning bidders were small businesses that claimed eligibility for bidding credits and won 13 of the 61 license sold in that auction.³⁰ The use of bidding credits furthers the Congressional directive to promote the involvement of "designated entities" (*i.e.* small businesses, rural telephone companies, and businesses owned by women and minorities) in the provision of spectrum-based services.³¹ With this directive, Congress sought to encourage diversity among service providers, as well as the rapid deployment of new technologies.

2. Allowing Smaller Antennas in the 11 GHz Band

36. In September 2007, the Commission adopted amendments to Section 101.115 of its Rules to permit the installation of smaller antennas by Fixed Service (FS) operators in the 10.7-11.7 GHz (11

²⁶ See Section 25.164 of the Commission's Rules, 47 C.F.R. § 25.164, *First Space Station Reform Order*, 18 FCC Rcd at 10827.

²⁷ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6003-6004 ¶¶ 17-19 (2008).

²⁸ *Id.* at 6007 ¶ 28. See 47 C.F.R. §§ 1.2110(f)(2), 27.1218.

²⁹ "Auction of Broadband Radio Service (BRS) Licenses Scheduled for October 27, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86," *Public Notice*, 24 FCC Rcd 8277 (2009) ("*Auction 86 Procedures Public Notice*"); "Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86," *Public Notice*, 24 FCC Rcd 13572 (2009) ("*Auction 86 Closing Public Notice*").

³⁰ See *Auction 86 Closing Public Notice*, 24 FCC Rcd 13572 (2009).

³¹ 47 U.S.C. § 309(j)(4)(D).

GHz) band.³² This decision reduced the minimum antenna diameter from 1.22 meters to 0.61 meters, while protecting other users from experiencing any greater interference than they would otherwise have experienced from systems using larger antennas.³³ The effect was to make 11 GHz transmission equipment significantly more affordable for users who could not otherwise have justified the costs involved: the smaller antennas not only cost less to manufacture and distribute; they are also less expensive to install because they weigh less and need less structural support, and they cost less to maintain because they are less subject to wind load and other destructive forces.³⁴ The smaller antennas also raise fewer aesthetic objections, thereby facilitating easier compliance with local zoning and homeowner association rules and generating fewer objections.³⁵

37. The deployment of smaller antennas could promote a wide range of fixed microwave applications that are not currently being provided for in the 11 GHz band for financial, aesthetic, and regulatory reasons. In addition, a number of the commenting parties in the proceeding identified themselves as small business entities and expressed their need to deploy smaller antennas in the 11 GHz band in order to open up economic opportunities and to provide for a wide range of services, including, for example, the provision of backhaul services.

3. Accommodating Broader Bandwidth Channels in the 6 MHz Band

38. On June 29, 2009, the Commission released a Notice of Proposed Rulemaking (NPRM) seeking comment on tripling the permissible bandwidth, to 30 megahertz, for terrestrial Fixed Service (FS) operations in the 6525-6875 MHz band (Upper 6 GHz Band).³⁶ The Commission issued this proposal in response to a petition for rulemaking filed by the Fixed Wireless Communications Coalition (FWCC), a coalition of companies, associations, and individuals interested in terrestrial point-to-point microwave communications.

39. The Commission found that the Lower 6 GHz Band, where 30 megahertz transmissions were already allowed, is increasingly congested. It noted that congestion in the Lower 6 GHz Band has led a number of applicants to seek and obtain waivers to operate FS stations in the Upper 6 GHz Band with bandwidths greater than 10 megahertz, the amount allowed under existing rules. While the waiver process has provided an alternative for applicants seeking wider bandwidths in the Upper 6 GHz, the waiver process has the disadvantages of delay and additional preparation costs. The Commission's Rules provide that applicants for FS licenses may operate their proposed stations pursuant to conditional authority at their own risk during the pendency of their applications if certain conditions are met.³⁷ One of those conditions is that the applicant has successfully completed the frequency coordination procedures specified in Section 101.103 of the Commission's Rules.³⁸ Conditional authority is not available, however, for applicants seeking rule waivers.³⁹ If adopted, therefore, the proposed rule changes would enable applicants to begin operations as soon as they complete the process of coordinating with existing licensees to ensure that they will not cause interference.

³² In the Matter of Amendment of Part 101 of the Commission's Rules to Modify Antenna Requirements for the 10.7-11.7 GHz Band, WT Docket No. 07-54, *Report and Order*, 22 FCC Rcd 17153 (2007).

³³ *Id.* at 17160 ¶ 9.

³⁴ *Id.* at 17160 ¶ 11.

³⁵ *Id.*

³⁶ Amendment of Part 101 of the Commission's Rules to Accommodate 30 Megahertz Channels in the 6525-6875 MHz Band, *et al.*, *Notice of Proposed Rulemaking and Order*, FCC 09-58 (released Jun. 29, 2009).

³⁷ 47 C.F.R. § 101.31(b)(1).

³⁸ 47 C.F.R. § 101.31(b)(1)(i).

³⁹ 47 C.F.R. § 101.31(b)(1)(iii).

40. The Commission also proposed to increase by 50 percent the number of channel pairs eligible for conditional authorizations in the 21.8-22.0 GHz and 23.0-23.2 GHz band (23 GHz band). The Commission was able to make this proposal in conjunction with the National Telecommunications and Information Administration (NTIA), which manages the Federal government's shared use of the 23 GHz band.

41. Allowing conditional authority allows applicants to put spectrum to use more quickly. It also saves applicants from having to take additional time and money to prepare a request for waiver of the Commission's Rules. Such additional time and expense may be particularly disadvantageous to small businesses. Furthermore, because waiver requests would be required, applicants cannot commence operation until the Commission grants their waiver requests and applications. The resulting delays can make it more difficult for applicants to meet their communications needs or the needs of their customers. With respect to the 23 GHz Band, the alternative approach would be to deny conditional authority on the two additional channel pairs and require applicants to wait until the Commission grants their applications before they can commence service. Again, the resulting delays can make it more difficult for applicants to meet their communications needs or the needs of their customers.

4. Antenna Structure Lighting Inspection

42. Section 17.47 (b) of the Commission's rules requires that the owner of any antenna structure which is registered with the Commission and has been assigned lighting specifications "[s]hall inspect at intervals not to exceed 3 months all automatic or mechanical control devices, indicators, and alarm systems associated with the antenna structure lighting to insure that such apparatus is functioning properly."⁴⁰ Since January 1, 2007, the Commission and WTB have granted waivers of section 17.47(b) to permit several tower owners to perform these inspections on an annual rather than quarterly basis.⁴¹ These companies were able to show that the quarterly on-site inspections were unnecessary because of the efficacy of their new, state of the art tower monitoring technologies. In addition, WTB has established streamlined processes through which tower owners utilizing certain specific, pre-approved monitoring systems may request and obtain such waivers.⁴² The granting of these waivers not only eliminates the quarterly cost and person-hour loss inherent in the quarterly inspection process for these businesses, but improves aviation safety through the promotion of tower-light monitoring innovation. The availability of such waivers, and the streamlined process that is available to many tower owners, enables small businesses that adopt these advanced technologies to better compete by easing the regulatory burdens on these companies.

⁴⁰ 47 C.F.R. § 17.47(b).

⁴¹ In the Matter of Requests of American Tower Corporation and Global Signal, Inc., to Waive Section 17.47(b) of the Commission's Rules, WT Docket No. 05-326, *Memorandum Opinion and Order*, 22 FCC Rcd 9743 (2007) (*ATC/GSI Waiver Order*); Petition of Optasite Towers L.L.C. for Waiver of Section 17.47(b) of the Commission's Rules, *Memorandum Opinion and Order*, 22 FCC Rcd 18456 (WTB 2007) (*Optasite Waiver Order*); In the Matter of Crown Castle USA Inc. Request for Waiver of 47 C.F.R. § 17.47(b), *Memorandum Opinion and Order*, 22 FCC Rcd 21881 (WTB 2007) (*Crown Castle Waiver Order*); In the Matter of Request of Global Tower LLC for Waiver of 47 C.F.R. § 17.47(b), *Memorandum Opinion and Order*, 23 FCC Rcd 16531 (WTB 2008) (*Global Tower Waiver Order*); In the Matter of TowerSentry LLC Request for Waiver of 47 C.F.R. § 17.47(b) and Joint Petition of Diamond Communications LLC for Waiver of 47 C.F.R. § 17.47(b), *Memorandum Opinion and Order*, 24 FCC Rcd 10774 (WTB 2009); In the Matter of Request of Mobilitie, LLC for waiver of 47 C.F.R. § 17.47(b) and Flash Technology Request for waiver of 47 C.F.R. § 17.47, *Memorandum Opinion and Order*, 24 FCC Rcd 11949 (WTB 2009).

⁴² In the Matter of TowerSentry LLC Request for Waiver of 47 C.F.R. § 17.47(b) and Joint Petition of Diamond Communications LLC for Waiver of 47 C.F.R. § 17.47(b), *Memorandum Opinion and Order*, 24 FCC Rcd 10774 (WTB 2009); In the Matter of Request of Mobilitie, LLC for waiver of 47 C.F.R. § 17.47(b) and Flash Technology Request for waiver of 47 C.F.R. § 17.47, *Memorandum Opinion and Order*, 24 FCC Rcd 11949 (WTB 2009).

5. 700 MHz Second Report and Order

43. The 700 MHz Band spectrum, which runs from 698-806 MHz and had been occupied by television broadcasters, has been made available for other wireless services, including public safety and commercial services, as a result of the digital television (DTV) transition. In August 2007, the Commission released a *700 MHz Second Report and Order*.⁴³ Several of the measures adopted by the Commission in the *700 MHz Second Report and Order* serve to facilitate market entry by small entities. For instance, the Commission revised the 700 MHz band plan to provide a mix of geographic service area licenses and spectrum block sizes for the 62 megahertz of commercial spectrum to be auctioned.⁴⁴ This revised band plan improved the opportunity for small entities to obtain valuable wireless spectrum by providing smaller licensing areas that better meet the needs of small entities, while avoiding the transaction costs associated with obtaining access to spectrum in the secondary market.⁴⁵

44. In the *700 MHz Second Report and Order*, the Commission also replaced the “substantial service” requirements for the 700 MHz Band commercial licenses with significantly more stringent performance requirements in order to promote the provision of innovative services to consumers throughout the license areas, including in rural areas.⁴⁶ The performance requirements are intended to discourage larger entities from purchasing spectrum for the purpose of warehousing it, and thus, may provide small entities with a greater chance of obtaining valuable spectrum.⁴⁷ Additionally, the keep-what-you-use rule ensures that spectrum covering areas that are not adequately built out is returned to the Commission and others are given an opportunity to acquire licenses for this spectrum.⁴⁸ Because the license areas returned to the Commission under the keep-what-you-use rule are likely to be smaller in nature, this rule provides small entities with an additional opportunity to obtain valuable wireless spectrum.⁴⁹ Furthermore, the *700 MHz Second Report and Order* modified Section 27.15(d) of the Commission’s rules regarding partitioning and disaggregation, which will allow smaller or newly-formed entities to enter the market for the first time, because they will be able to negotiate for portions of original licenses at costs that are proportionately less than the entire license.⁵⁰ Taking a measured step to encourage additional innovation and consumer choice at a critical stage in the evolution of wireless broadband services, the *700 MHz Second Report and Order* also required licensees of the Upper 700

⁴³ See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (“*700 MHz Second Report and Order*”) *recon. pending*.

⁴⁴ *Id.* at 15315-16 ¶ 62.

⁴⁵ *Id.* at 15550, App. C ¶ 30.

⁴⁶ *Id.* at 15348 ¶ 153.

⁴⁷ *700 MHz Second Report and Order*, 22 FCC Rcd at 15551, App. C ¶ 33.

⁴⁸ *Id.* at 15551, App. C ¶ 35

⁴⁹ *Id.*

⁵⁰ *Id.* at 15552, App. C ¶ 41.

MHz C Block to provide open platforms for devices and applications.⁵¹ The open platform requirement for devices and applications provides additional opportunities for small entities to participate in the device and application market, since such a requirement makes it easier for customers, device manufacturers, third-party application developers, and others to use or develop devices and applications made by small entities on the network of the C Block licensee.⁵²

45. With regard to auctions-related issues, the *700 MHz Second Report and Order* implemented specific auction procedures to improve the opportunity for small businesses to successfully bid on 700 MHz Band licenses. Because bidding information could be used by incumbents to deter or exclude new entrants, the Commission adopted anonymous bidding procedures for the auction of the 700 MHz licenses.⁵³

6. Roaming

46. Roaming issues are of considerable importance to small businesses. Roaming occurs when the subscriber of one commercial mobile radio service (“CMRS”) carrier utilizes the facilities of another CMRS carrier, with which the subscriber has no direct pre-existing service or financial relationship, to place an outgoing call, to receive an incoming call, or to continue a call in-progress.⁵⁴ Roaming occurs most often when a subscriber places or receives a call while physically located outside of the service area of its “home” CMRS provider.⁵⁵ Roaming services, particularly “automatic roaming” – through which the roaming subscriber is able to originate or terminate a call without taking any special actions – have become widely available. While most CMRS carriers have reached automatic roaming agreements with each other, some regional and rural carriers have alleged that nationwide carriers have not been willing to agree to reasonable roaming terms and conditions when negotiating with their smaller competitors.⁵⁶ Rural operators have expressed to the Commission that availability of automatic roaming arrangements is crucial to a small carrier’s ability to compete, because small carriers have limited service areas and the ability to roam on other carriers’ networks is limited by technology—specifically, consumers can roam only on networks that use the same technical standard (CDMA, TDMA, GSM, iDEN) as their home carrier.

47. Partly in response to the concerns of small carriers, the Commission adopted the *Roaming Report and Order and Further Notice of Proposed Rulemaking* in August 2007. The *Roaming Report and Order* found that roaming is a common carrier obligation for CMRS carriers. Moreover, under the automatic roaming rule adopted in the *Roaming Report and Order*, CMRS carriers are required to provide, under reasonable and nondiscriminatory terms and conditions, automatic roaming services, upon reasonable request, to any requesting technologically compatible CMRS carrier outside of the requesting carrier’s “home market” (any geographic location where the home carrier has a wireless license or

⁵¹ *Id.* at 15361 ¶ 201.

⁵² *Id.* at 15552, App. C ¶ 42.

⁵³ *700 MHz Second Report and Order*, 22 FCC Rcd at 15553, App. C ¶ 47.

⁵⁴ See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15819 ¶ 5 (2007) (“*Roaming Report and Order*” and “*Roaming Further Notice*” respectively) *recon. pending*.

⁵⁵ See generally *Roaming Report and Order*, 22 FCC Rcd at 15819-20 ¶¶ 5-6. See also Section 22.99 of the Commission’s rules which describes a “roamer” as “[a] mobile station receiving service from a station or system in the Public Mobile Services other than one to which it is a subscriber.” 47 C.F.R. § 22.99.

⁵⁶ See generally Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007) (“*Roaming Report and Order*” and “*Roaming Further Notice*” respectively).

spectrum usage rights that could be used to provide CMRS).⁵⁷ In the *Roaming Further Notice*, the Commission sought comment on whether an automatic roaming obligation should be extended to data services that are classified as information services and services that are not CMRS.⁵⁸

7. Hearing Aid Compatibility

48. The Commission's wireless hearing aid compatibility rules⁵⁹ enhance the ability of persons with hearing disabilities to access digital wireless telecommunications. Taking into account a consensus proposal developed by industry and consumer representatives, the Commission adopted its *Hearing Aid Compatibility First Report and Order*⁶⁰ in February 2008 to update its hearing aid compatibility rules, including new deployment requirements that permit manufacturers and service providers to offer either specified numbers or percentages of handset models that meet hearing aid compatibility standards. Under the percentage option, service providers and manufacturers with smaller product lines, including many small businesses, are relieved of the burden of having to offer the numbers of hearing aid-compatible models required of their larger competitors. Because small business service providers may have few handset options and more difficulty in obtaining the newest offerings than their nationwide counterparts, the Commission extended future hearing aid compatibility deployment deadlines for non-nationwide service providers by three months. The Commission also retained the existing *de minimis* exception⁶¹ to exempt companies with very small product lines from hearing aid compatibility requirements.

49. To facilitate enforcement and public information, the Commission also extended and modified its annual hearing aid compatibility reporting requirements for manufacturers and service providers. Pursuant to the Commission's delegation of authority, WTB promulgated a new electronic FCC Form 655 for mandatory use in submitting these reports.⁶² In addition to facilitating the Commission's compilation of data from the reports and the availability of information to the public, the new system eases the burden on manufacturers and service providers of complying with the reporting

⁵⁷ 47 U.S.C. § 20.3; see *Roaming Report and Order*, 22 FCC Rcd at 15826, 15835 ¶¶ 23, 48.

⁵⁸ *Roaming Further Notice*, 22 FCC Rcd at 15845-46 ¶ 79. Several parties petitioned for reconsideration of certain aspects of the *Roaming Report and Order*. In April 2010, the FCC adopted an *Order on Reconsideration* addressing the petitions for reconsideration and also issued a *Second Notice of Proposed Rulemaking* seeking additional comment on whether to adopt an automatic data roaming obligation. Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 25 FCC Rcd 4181 (2010).

⁵⁹ 47 C.F.R. § 20.19.

⁶⁰ Amendment Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets Telephones, WT Docket No. 07-250, Petition of American National Standards Institute Accredited Standards Committee C63 (EMC) ANSI ASC C63@s. 01-309, 06-203, *First Report and Order and Second Further Notice of Proposed Rulemaking*, 23 FCC Rcd 3406 (2008) ("*Hearing Aid Compatibility First Report and Order*").

⁶¹ Under this exception, manufacturers and service providers that offer two or fewer digital wireless handset models in the U.S. per air interface are exempt from hearing aid compatibility requirements (other than certain reporting requirements), and those offering three handset models per air interface are required to offer one hearing aid-compatible model. See 47 C.F.R. § 20.19(e).

⁶² See "The Wireless Telecommunications Bureau Receives Clearance from the Office of Management and Budget (OMB) to Make Mandatory the Use of Electronic FCC Form 655 for Hearing Aid Compatibility Status Reports," *Public Notice*, 24 FCC Rcd 7798 (WTB 2009); "The Wireless Telecommunications Bureau Reminds Manufacturers and Service Providers of Their Obligation To Report on the Status of Compliance with the Commission's Hearing Aid Compatibility Requirements," *Public Notice*, 23 FCC Rcd 18078 (WTB 2008); "The Wireless Telecommunications Bureau Receives Clearance from the Office of Management and Budget (OMB) to Make Mandatory the Use of Electronic FCC Form 655 for Hearing Aid Compatibility Status Reports," *Public Notice*, DA 09-1298 (WTB rel. June 10, 2009).

requirements. For example, the system ensures the appropriate completion of required fields, and it stores data from one year's submission for easy copying into the next year's report. In addition, the electronic accessibility of manufacturers' reports gives service providers ready access to information regarding the hearing aid compatibility status of the handset models that they offer. By easing the burden of compliance, the electronic reporting system reduces entry barriers for small businesses.

8. Historic Preservation Review

50. The National Environmental Policy Act (NEPA) requires all federal agencies to implement procedures to make environmental consideration a necessary part of an agency's decision-making process.⁶³ As a licensing agency, the Commission complies with NEPA by requiring Commission licensees and applicants to review their proposed actions for environmental consequences. Under Section 106 of the National Historic Preservation Act (NHPA), federal agencies are required to consider the effects of federal undertakings on historic properties.⁶⁴ To comply with the NHPA, the Commission requires its licensees and applicants to follow the procedures set forth in the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (NPA).⁶⁵

51. In October 2008, WTB introduced the Electronic Section 106 (E-106) System to facilitate and improve compliance with the process required under the NPA.⁶⁶ The E-106 System is a voluntary system designed to save users time and resources by automating and expediting the exchange of information and correspondence in the Section 106 process. Specifically, the E-106 System permits licensees and applicants electronically to submit the forms required under the NPA to State Historic Preservation Officers, federally recognized Indian Tribes, Native Hawaiian organizations (NHOs), and other consulting parties. These parties may in turn use the E-106 System to comment on or otherwise respond to the submissions. Among the benefits of the System to licensees and applicants are that it standardizes and streamlines submission of the required forms, prevents filing of submission packets if all required fields are not complete, provides automatic on-line notification of developments during the review process, and reduces the time and resources that would otherwise be devoted to the exchange of correspondence during that process. The E-106 System thereby reduces entry barriers by making it easier for small businesses to complete the required review process.

52. WTB similarly facilitates completion of Section 106 review, and thereby creates conditions under which small businesses may more easily compete, through its continued administration of the Tower Construction Notification System (TCNS). TCNS allows tower constructors electronically to identify and initiate communications with Tribes and NHOs that have asserted a traditional religious and cultural interest in historic properties within the geographic area of a proposed tower. It provides a means for Tribes and NHOs to respond electronically to the applicant's notification, and permits Tribes and NHOs efficiently to provide other information about their review process. WTB continues to encourage Tribes to narrow their geographic areas and to adopt efficient review policies.

9. Transition to 6.25 kHz Technology Delayed

53. In 2003, the Commission established deadlines for certain private land mobile radio (PLMR) licensees that operate on 25 kHz-bandwidth channels to transition to equipment utilizing 12.5 kHz channels, or achieving equivalent efficiency. The Commission also sought comment on whether

⁶³ 42 U.S.C. § 4332.

⁶⁴ 16 U.S.C. § 470f.

⁶⁵ 47 C.F.R. Part 1, App. C; *see* 47 C.F.R. § 1.1307(a)(4).

⁶⁶ *See* "The Wireless Telecommunications Bureau Announces the Introduction of a Streamlined Process and Automated System to Expedite the Commission's Review of Proposed Construction Projects," *Public Notice*, 23 FCC Rcd 13560 (WTB 2008).

those private land mobile radio (PLMR) licensees should be required to transition at some later date to 6.25 kHz technology.⁶⁷ In 2004, the Commission sought comment, on a proposal⁶⁸ to defer or eliminate the requirement in Sections 90.203(j)(4)-(5) of the Commission's Rules⁶⁹ that certain applications for equipment authorizations received on or after January 1, 2005, must specify 6.25 kHz capability. It also stayed the January 1, 2005, compliance date.⁷⁰

54. In its *Third Report and Order*, the Commission addressed the comments and reply comments received in response to the *Second Further Notice* and the *Third Further Notice*.⁷¹ The Commission delayed the implementation of requiring certain PLMR licensees to transition to a more spectrum efficient, 6.25 kHz technology. The delay, until January 1, 2011, provided relief to equipment manufacturers and users, large and small alike. The new compliance date balanced reducing the immediate burden on those small manufacturers and operators and encouraging the development and use of spectrally efficient technology.

10. More Efficient and Flexible Spectrum Use for Part 90 Licensees

55. In its *Notice of Proposed Rulemaking and Order*,⁷² the Commission initiated a proceeding to propose miscellaneous rule changes to Part 90 of the Commission's Rules,⁷³ and to related rules in other rule parts. The Commission sought comment regarding particular changes to the rules governing the 4.9 GHz band and the Wireless Medical Telemetry Service, which shares spectrum with Part 90 operations. The Commission also solicited comment on other potential Part 90 rule changes, including suggestions to revise or eliminate provisions that are duplicative, outmoded or otherwise unnecessary. Finally, the Commission took the opportunity to make certain minor editorial amendments to Part 90 to correct errors or omissions of publication, eliminate duplicative language, or harmonize Part 90 provisions to other rule sections.

56. This proceeding is part of the Commission's continuing effort to provide clear and concise rules that facilitate new wireless technologies, devices and services, and are easy for the public to

⁶⁷ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Second Report and Order and Second Further Notice of Proposed Rule Making and Order*, WT Docket No. 99-87, RM-9332, 18 FCC Rcd 3034 (2003). In March 2010, the FCC adopted a *Second Report and Order and Second Further Notice of Proposed Rulemaking* that addressed the proposed rule changes in the *Notice of Proposed Rulemaking*. Amendment of Part 90 of the Commission's Rules, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, WP Docket No. 07-100, 25 FCC Rcd 2479 (2010). In May 2010, the FCC adopted an *Order on Reconsideration* clarifying the *Report and Order*. Amendment of Part 90 of the Commission's Rules, *Order on Reconsideration*, WP Docket No. 07-100, 25 FCC Rcd 5105 (2010).

⁶⁸ Joint Petition of E.F. Johnson Company, Kenwood U.S.A. (Kenwood) and Motorola, Inc. (Motorola) to Defer Enforcement of Section 90.203(j)(5) of the Commission's Rules, WT Docket No. 99-87, RM-9332 (filed July 14, 2004) (Petition to Defer).

⁶⁹ 47 C.F.R. § 90.203(j)(4)-(5).

⁷⁰ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Third Memorandum Opinion and Order, Third Further Notice of Proposed Rule Making and Order*, WT Docket No. 99-87, RM-9332, 19 FCC Rcd 25045 (2004).

⁷¹ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Third Report and Order*, WT Docket No. 99-87, RM-9332, 22 FCC Rcd 6083 (2007).

⁷² Amendment of Part 90 of the Commission's Rules, *Notice of Proposed Rulemaking*, WP Docket No. 07-100, 22 FCC Rcd 9595 (2007).

⁷³ See 47 C.F.R. Part 90.

understand.⁷⁴ The proposed Part 90 rule changes are designed to promote flexibility and more efficient use of the spectrum, reduce administrative burdens on both the Commission and licensees, and allow licensees to better meet their communication needs. The licensees include public safety agencies, businesses that use radio only for their internal operations, utilities, transportation entities, and medical service providers as well as those who offer paging and Specialized Mobile Radio services that offer customers communications that are interconnected to the public switched network.

11. Domestic Implementation of Automatic Identification Systems (AIS)

57. In its *Second Report and Order* in WT Docket No. 04-344,⁷⁵ the Commission adopted measures for the domestic implementation of Automatic Identification Systems (AIS), an advanced marine vessel tracking and navigation technology that can significantly enhance the Nation's homeland security as well as maritime safety. Among other things, these measures would reduce costs to manufacturers by eliminating the possible need to design devices to two potentially conflicting standards, and would reduce costs to small business and recreational boat users of the devices both from a pass-through of manufacturers' cost savings and by eliminating the possible need to fit their vessels with more than one Class B AIS device if they travel outside U.S. territorial waters, *i.e.*, removing the need to carry one Class B AIS device to function within U.S. territorial waters, and another Class B AIS device to function in international waters or other nations' territorial waters.

12. Site-Based Licensing Retained for Business and Industrial Land Transportation

58. In its *Report and Order* in WT Docket 05-62,⁷⁶ the Commission retained the current site-based licensing paradigm for the 199 channels allocated to the Business and Industrial Land Transportation (B/ILT) Pool in the 896-901 MHz/935-940 MHz (900 MHz) band⁷⁷ and declined to adopt the geographic area/channel block licensing and competitive bidding rules proposed in the *Notice of Proposed Rulemaking*.⁷⁸ The Commission found that the adverse effects of changing the licensing system on all current and future licensees in this service, and particularly small businesses, were too great. Also established was a generally-applicable interference protection standard for the 900 MHz B/ILT Pool that will effectively eliminate costs that all licensees, including small entities, would incur to resolve any interference complaints.

⁷⁴ See, e.g., 1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile Radio Services, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 98-182, 15 FCC Rcd 16673 (2000) (*Biennial Review R&O*); see also Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27 and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, *Notice of Proposed Rulemaking*, WT Docket No. 03-264, 19 FCC Rcd 708 (2004).

⁷⁵ Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Second Report and Order*, WT Docket No. 04-344, 23 FCC Rcd 13711 (2008).

⁷⁶ See Amendment of Part 90 of the Commission's Rules To Provide for Flexible Use of the 896-901 MHz and 935-940 MHz Bands Allotted to the Business and Industrial Land Transportation Pool, *Report and Order*, WT Docket No. 05-62, 23 FCC Rcd 15856 (2008).

⁷⁷ 47 C.F.R. § 90.617(c), Table C – Business/Industrial/Land Transportation Category 896-901/935-940 MHz Band Channels (199 Channels) (2006).

⁷⁸ See Amendment of Part 90 of the Commission's Rules To Provide for Flexible Use of the 896-901 MHz and 935-940 MHz Bands Allotted to the Business and Industrial Land Transportation Pool, WT Docket No. 05-62; Oppositions and Petitions for Reconsideration of the 900 MHz Band Freeze Notice, DA 04-3013, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 20 FCC Rcd 3814 (2005).

13. Rule Streamlining Extended to Benefit Advanced Wireless Services (AWS) and Personal Communications Services (PCS)

59. In its *Third Report and Order* in WT Docket 03-264,⁷⁹ the Commission took further steps to streamline and harmonize its rules related to Wireless Radio Services (WRS) by adopting modifications to the rules governing radiated power limits for Personal Communications Services (PCS) and Advanced Wireless Services (AWS). Specifically, whereas the existing rules set the radiated power limits in terms of watts-per-emission regardless of bandwidth size, the Commission will now permit use of a Power Spectral Density (PSD) model, with radiated power levels calculated on a watts-per-megahertz basis, when operating with greater than 1 MHz bandwidth. The PSD approach offers more flexibility, is more technologically neutral, and will better accommodate newer technologies employing wider bandwidths. Also, the PSD model will potentially reduce infrastructure costs, thus enabling rural service providers to offer enhanced service in these areas. The Commission also will now permit PCS and AWS licensees to measure and express radiated power on an average rather than peak basis. This approach is more realistic and more appropriate for newer wireless technologies producing emissions with sub-microsecond power spikes.

14. Information Provided on Auction and Licensing Processes

60. Finally, the Bureau provided information on auction and licensing processes to all sectors of the wireless telecommunications community and the general public in various ways. Information was disseminated through trade show booths, webpages, Auctions/ULS Hot Line, pre-auction seminars, and a dedicated Auction Support telephone line.

15. Recent Auctions and Provisions for Small Businesses

61. Since January 1, 2007, the Commission has conducted eleven spectrum auctions and in all but one auction offered bidding credits to participants in auctions of wireless licenses who qualified as a small business or participants in auctions of broadcast construction permits who qualified as a new entrant. Bidding credits provide a 15, 25 or 35 percent discount on winning bids that help to reduce market entry barriers for providers of wireless communications or broadcast services, including small businesses and other new entrants.

62. In the fifty auctions completed by the Commission to date that offered small business bidding credits, 75% of the qualified bidders that identified themselves as rural telephone companies were eligible for bidding credits, and 75% of all qualified bidders were eligible for bidding credits.

63. The Commission has continued to adopt band plans that address the needs of smaller businesses for different types of spectrum blocks and geographic license areas. By designating a mix of geographic areas and spectrum block sizes, including spectrum for licensing over smaller and rural geographic areas, the Commission has promoted access to spectrum by smaller carriers, new entrants, and rural telephone companies. The relatively smaller spectrum blocks and geographic license areas provide opportunities for new entrants and other small companies by offering spectrum in amounts and license area sizes that may be more closely aligned with entities whose business plans may require less spectrum. In five of the six auctions of wireless licenses conducted since January 2007, licenses for at least one block of spectrum were offered in small geographic areas.

64. The Commission facilitated the participation of small businesses in the provision of spectrum-based services through its implementation and enforcement of improved rules governing these “designated entities” to better deter unqualified entities from attempting to circumvent eligibility requirements. In 2006, the Commission adopted the *CSEA Second Report and Order and Second Further*

⁷⁹ Biennial Regulatory Review -- Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, *Third Report and Order*, WT Docket No. 03-264, 23 FCC Rcd 5319 (2008).

Notice of Proposed Rulemaking (petitions for reconsideration pending), in which it strengthened its unjust enrichment rules, leasing requirements, reporting obligations, and auditing requirements to ensure that the recipients of designated entity benefits are bona fide small businesses that use their licenses directly to provide facilities-based telecommunications services for the benefit of the public.⁸⁰ The Commission adopted rules to limit the award of designated entity benefits to any applicant or licensee that has “impermissible material relationships” or “attributable material relationships” created by certain agreements with one or more entities for the lease or resale of its spectrum capacity.⁸¹ The Commission also adopted stricter unjust enrichment rules, including a ten-year unjust enrichment schedule for licenses acquired with bidding credits, to discourage speculation by investors in designated entities and by non-designated entities that hope to benefit ultimately from the discounted spectrum licenses.⁸² The Commission also clarified how it will implement its rules concerning audits, and refined its rules with respect to the reporting obligations of designated entities to ensure its continued ability to safeguard the award of designated entity benefits.⁸³

16. The Auction Process

65. With two exceptions, prior to the start of each Commission spectrum auction conducted since January 2007, the Wireless Telecommunications Bureau continued its standard practice and held a seminar for bidders to provide additional information about auction procedures.⁸⁴ These seminars were offered free-of-charge and provided anyone interested in specific auctions the opportunity to see presentations on radio service and auction rules and observe a demonstration of the competitive bidding system. The Commission also made its pre-auction seminars available for viewing live over the Commission’s Internet site. A recording of the seminar presentations was also made available for playback from the FCC’s Web site following the seminar.⁸⁵

66. The Commission used a web-based auction application filing and auction bidding system (the Integrated Spectrum Auction System or “ISAS”) that facilitates participation in its spectrum auctions by a wide range of potentially qualified applicants. The Commission’s Internet-based design provides a user-friendly bidding environment for auction participants. ISAS includes FCC Form 175 application enhancements — such as automated checking of data accuracy, improved application search functionality, and integration with FCC Form 602 — as well as bidding system changes for easier

⁸⁰ Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006).

⁸¹ *Id.* at 4759-65 ¶¶ 15-30.

⁸² *Id.* at 4765-68 ¶¶ 31-41.

⁸³ *Id.* at 4769-70 ¶¶ 46-50.

⁸⁴ There were no seminars prior to Auctions 68 and 77. Auction 68 was an auction of nine FM broadcast construction permits that had originally been offered in Auction 37 and/or Auction 62. These permits were offered in Auction 68 because a bidder had either withdrawn a high bid during one of the previous auctions or a winning bidder had defaulted on a construction permit after the close of the auction. Auction 68 applicants were provided instructions for viewing online a recording of the Auction 62 seminar. See “Auction of FM Broadcast Construction Permits Scheduled for January 10, 2007; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction No. 66,” *Public Notice*, 21 FCC Rcd 11,144 (2006). Auction 77 was an auction of Cellular Radiotelephone Service licenses covering two different unserved areas, for which participation was limited to the four parties that had previously filed mutually exclusive applications proposing service to specific unserved areas. See “Closed Auction of Licenses for Cellular Unserved Service Areas Scheduled for June 17, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77,” *Public Notice*, 23 FCC Rcd 6670 (2008).

⁸⁵ See, e.g., http://wireless.fcc.gov/auctions/default.htm?job=auction_seminar&id=73.

navigation, customizable results, and enhanced bidding features. The bidding system allows for multiple types of auctions (*e.g.*, simultaneous single or multiple round auctions or simultaneous multiple round auctions with package bidding, and auctions with full information disclosure or limited information disclosure). As of December 2009, nineteen auctions have been completed using ISAS.

67. As a service to auction participants, an Auction Support telephone line was available to assist with auction-specific questions during the course of auction events. Additionally, auction participants were able to place bids telephonically. This feature enhances the auction program by allowing bidders to call in their bids if they were either unable to access their computer, or if they were unfamiliar with the software and preferred auction experts to assist them. Telephonic bidding also enhanced the accessibility of the auction bidding system to individuals with disabilities.

17. 700 MHz Proceeding and 700 MHz Auction

68. In the *700 MHz Second Report and Order*, the Commission adopted a revised band plan for 62 megahertz of the commercial spectrum in the 700 MHz band that included a mix of small, regional, and large geographic service area licenses – CMAs, EAs, and REAGs respectively.⁸⁶ As a result, a total of 24 megahertz of spectrum in the band was made available on a CMA basis, 18 megahertz was made available on an EA basis, and 28 megahertz was made available on an REAG or EAG basis. By providing a balanced mix of geographic service area licenses and spectrum block sizes in the 700 MHz band, the Commission promoted its goals of disseminating licenses among a wide variety of applicants, accommodating the competing need for both large and small licensing areas, and meeting the various needs expressed by potential entrants seeking access to the spectrum and incumbents seeking additional spectrum. In Auction 73, which offered 62 megahertz of spectrum in the 700 MHz band, 101 bidders won 1090 licenses, over half of whom (56) were small businesses taking advantage of the Commission's bidding credits program. A total of 99 bidders other than the nationwide wireless incumbents won 754 licenses, representing over 69 percent of the 1090 licenses sold in the auction. A bidder other than a nationwide incumbent won a license in every market, so in every market, a party other than a nationwide incumbent can offer a wireless third pipe. In the A and B spectrum blocks alone, small and rural providers won spectrum that covered almost the entire country.⁸⁷

69. To encourage the widest range of potentially qualified applicants to participate in bidding for the 700 MHz nationwide D Block license, in the *700 MHz Second Report and Order*, the Commission enabled eligible applicants for that license to seek designated entity bidding credits for small businesses as a means to create incentives for investors to provide innovative small businesses with the capital necessary to compete for the D Block license at auction.⁸⁸ The Commission subsequently decided to waive, on its own motion, the application of its "impermissible material relationship" rule for purposes of determining an applicant's or licensee's designated entity eligibility solely with respect to arrangements

⁸⁶ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, *Second Report and Order*, 22 FCC Rcd 15,289, 15,305-15,316 ¶¶ 42-61 (2007) ("*700 MHz Second Report and Order*").

⁸⁷ See News Release, "Statement by FCC Chairman Kevin J. Martin," (rel. March 20, 2008) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280968A1.pdf).

⁸⁸ *700 MHz Second Report and Order*, 22 FCC Rcd at 15,473-74 ¶¶ 535-37.

for lease or resale (including wholesale) of the spectrum capacity of the D Block license.⁸⁹ The Commission found that the unique regulations then governing the D Block license, which subjected the licensee to significant obligations and substantial Commission oversight, when combined with the continued application of other designated entity rules, eliminated for the D Block license the risks that led the Commission to adopt the impermissible material relationship rule, and it concluded that waiver of the impermissible material relationship rule served the public interest.⁹⁰

70. The Commission determined in the *700 MHz Second Report and Order* that in Auction 73, anonymous bidding procedures would be used to promote competition for 700 MHz licenses.⁹¹ Under anonymous bidding procedures, information that may indicate specific applicants' interests in the auction, including their license selections and bidding activity, is withheld from public release until after the auction closes. Small bidders in particular benefit if larger bidders are unable to identify which bids are made by small bidders with relatively limited resources and thereby target licenses sought by small bidders. In several auctions immediately prior to Auction 73, the Commission had adopted certain anonymous bidding procedures, made contingent on a specified pre-auction assessment of likely competition in the auction. In the *700 MHz Second Report and Order*, the Commission concluded based on the record in that proceeding that implementing anonymous bidding procedures would reduce the potential for anti-competitive bidding behavior, including bidding activity that aims to prevent the entry of new competitors.⁹² Starting with Auction 73, the Commission has used anonymous bidding without a pre-auction measurement of likely competition in a number of Commission auctions for wireless services licenses, including in an auction of licenses for Advanced Wireless Services in the 1710-1755 MHz and 2110-2155 MHz bands, and broadband PCS.

71. The Commission has continued to investigate, through experimental economic testing, the effects of different auction formats on different types of bidders. This testing has compared the Commission's simultaneous multiple round ("SMR") auction formats with several package bidding formats.⁹³ Among other things, the experiments examined whether bidders interested in small groups of licenses could effectively compete in a package bidding format with bidders interested in larger numbers of licenses. The results of the experiments indicated that, while many factors influence whether a package bidding auction format should be used, including whether bidders wishing to aggregate licenses would benefit significantly from reduced exposure risk with package bidding, the package bidding auction structure and pricing rules can be effective in helping small bidders compete fairly against large package bids. In Auction 73, the Commission implemented a simultaneous multiple round auction format with hierarchical package bidding ("HPB") for licenses in the 700 MHz C Block, after experimental economic testing indicated that such a format would not unfairly disadvantage smaller bidders.⁹⁴ The SMR-HPB auction format offered every license in the C Block for bid at the same time with successive

⁸⁹ Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, *Order*, 22 FCC Rcd 20,354 (2007).

⁹⁰ *Id.* at 20,358 ¶ 9.

⁹¹ *700 MHz Second Report and Order*, 22 FCC Rcd at 15,390-95 ¶¶ 274-84.

⁹² *Id.* at 15,393 ¶ 280.

⁹³ "Auction of 700 MHz Band Licenses Scheduled For January 16, 2008, Comment Sought on Competitive Bidding Procedures for Auction 73," *Public Notice*, 22 FCC Rcd 15,004, 15,010-14 ¶¶ 17-24.

⁹⁴ See "Auction of 700 MHz Band Licenses Scheduled For January 24, 2008, Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76," *Public Notice*, 22 FCC Rcd 18,141, 18,179-81 ¶¶ 138-44.

bidding rounds in which eligible bidders could place bids on individual licenses and on certain pre-defined packages of specified licenses.

18. Rural Broadband Outreach

72. WTB continues to make considerable efforts to reach out and provide information to rural America, including entrepreneurs and other small businesses, through a Joint Federal Rural Outreach Initiative. This initiative has created a partnership between the Commission's Wireless Telecommunications Bureau and the U.S. Department of Agriculture's Rural Utilities Service (now Rural Development) to assist rural America. As part of this initiative, the FCC and USDA launched an on-line resource for those in rural America looking to bring the benefits of broadband services to their communities. This "Broadband Opportunities for Rural America" website makes available the expertise and resources of the FCC and USDA in a single, easily-accessible location and a user-friendly format. It provides information on the different broadband technologies that can be used to bring broadband to rural America, how to access spectrum necessary for delivery of wireless broadband services, the broadband funding opportunities provided by USDA, and instructions on how to locate companies already licensed to provide wireless services in or near specific rural communities, as well as helpful links to other FCC, USDA, and private resources related to encouraging broadband opportunities in rural America.

73. To more fully address the needs of the public, WTB, in conjunction with USDA, conducted four regional, day-long educational workshops on rural broadband in different locations across the country during 2008. The workshops provided rural communities and organizations with information on FCC and USDA resources, including the broadband funding opportunities from USDA and information on broadband technologies, policies, and spectrum access from the FCC. The workshops also provided an opportunity for applicants to meet with FCC/USDA staff face-to-face, to gain a better understanding of their programs regarding broadband, and to ask questions. There were also "Success Story" speakers at three of the four workshops who were FCC licensees and had obtained funding for their communities through the loan and/or grant programs from USDA.

D. Wireline Competition Bureau

74. Pursuant to the Section 257 Triennial Review directive, the Wireline Competition Bureau (WCB or the Bureau) initiated numerous steps to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision of telecommunications and information services and equipment. For example, the Commission launched a rulemaking to determine whether Commission rules were required to preserve a free and open Internet. The Commission also released two orders addressing delays in and obstruction of the local number portability (LNP) process, including as it pertains to Voice over Internet Protocol (VoIP) services, thereby enabling end users to retain their telephone numbers when changing service providers, thus eliminating a major disincentive for end users to switch to new carriers, and in so doing, enhancing competition. The Commission further adopted restrictions on providers using customer information received in the local number porting process or for the provision of 911 or enhanced 911 (E911) services for customer retention marketing purposes. Additionally, the Commission released an order enacting rules to ensure that interconnected VoIP providers have access to any and all capabilities necessary to provide 911 or E911 services. Also benefiting small businesses were a number of orders relating to the Universal Service Fund. A more detailed examination of WCB's activities is set forth below.

1. Network Management and the Open Internet

75. On September 23, 2005, the Commission released an *Internet Policy Statement* announcing four principles intended to protect consumers' access to foster the widespread creation,

adoption and use of Internet content, applications, and services.⁹⁵ On November 1, 2007, the Commission received a complaint and petition for declaratory ruling asking that the Commission declare that Comcast Corporation (Comcast) violated the *Policy Statement* when it intentionally and covertly degraded its customers' lawful communications.⁹⁶ In the subsequent *Comcast Order*,⁹⁷ the Commission found that Comcast's practices selectively targeted and interfered with lawful peer-to-peer networking applications used by consumers and upstart online content developers, and concluded that Comcast's "discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and access Internet and does not constitute reasonable network management."⁹⁸ The Commission noted that variance from standard Internet protocols and practices "damages the Internet as a whole, including the ability of entrepreneurs to enter the market with new Internet services. Contravention of these standard protocols and practices through discriminatory conduct thus erects barriers to entry that would not otherwise exist."⁹⁹ The Commission found that "[b]y exercising authority over this complaint, we are able to ensure that Comcast's actions do not inappropriately hinder entry by 'entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.' In addition, by facilitating such entry, we also promote the Act's policies favoring 'a diversity of media voices' and 'technological advancement.'"¹⁰⁰ The Commission required that Comcast disclose its network management practices so that the Commission and the public could ensure that Comcast complied with its voluntary commitment to abandon its discriminatory network management practices.¹⁰¹

76. On October 22, 2009, the Commission released a Notice of Proposed Rulemaking proposing rules to preserve the free and open Internet.¹⁰² The *Open Internet NPRM* proposed to codify the four principles the Commission articulated in the *Internet Policy Statement*; a fifth principle that would require broadband Internet providers to treat lawful content, applications, and services in a nondiscriminatory manner; and a sixth principle that would require broadband Internet service providers

⁹⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Policy Statement*).

⁹⁶ Petition of Free Press; Public Knowledge; the Media Access Project; Consumer Federation of America; Consumers Union; Information Society Project at Yale Law School; Professor Charles Nesson, Faculty Co-Director, Berkman Center for Internet & Society, Harvard Law School; and Professor Barbara van Schewick, Center for Internet & Society, Stanford Law School for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," WC Docket No. 07-52, at 2-3 (Nov. 1, 2007) (Petition); Formal Complaint of Free Press and Public Knowledge against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; File No. EB-08-IH-1518 (Nov. 1, 2007) (Complaint).

⁹⁷ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* WC Docket No. 07-52, File No. EB-08-IH-1518, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (*Comcast Order*), vacated *sub nom. Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast v. FCC*).

⁹⁸ *Id.* at 13028, para. 1, 13030, paras. 4-5, 13050-56, paras. 41-47.

⁹⁹ *Id.* at 13040, para. 20 (quotation marks and citations omitted) (asserting that exercising authority over the Complaint is reasonably ancillary to the Commission's responsibilities under section 257 of the Act).

¹⁰⁰ *Id.* (quoting 47 U.S.C. § 257).

¹⁰¹ *Id.* at 13059-60, para. 54.

¹⁰² *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 23064 (2009) (*Open Internet NPRM*).

to disclose such information concerning network management as is reasonably required for users and content, application, and service providers to enjoy the protections specified in the proposed rules.¹⁰³ The proposed rules were subject to exceptions for reasonable network management, and did not prohibit broadband Internet service providers from taking reasonable action to prevent the transfer of unlawful content or the unlawful distribution of copyrighted works.¹⁰⁴ The Commission noted in the *Open Internet NPRM* that the historically open nature of the Internet “has had the effect of empowering entrepreneurs to innovate without needing to seek permission,” and that “[b]y allowing innovation to be easily implemented at the edge of the network, the end-to-end design of the Internet has lowered technical, financial, and administrative barriers to entry for entrepreneurs with technical skill and bright ideas.”¹⁰⁵ The Commission also explained that its goals were informed by section 257’s mandate that it promote “the policies and purposes of [the Communications] Act favoring a diversity of media voices.”¹⁰⁶ By initiating the *Open Internet* proceeding, the Commission sought to ensure that broadband Internet access service providers’ network management practices did not create barriers to entry for entrepreneurs and small businesses.¹⁰⁷

2. Local Number Portability

77. Section 251(b) of the Communications Act requires local exchange carriers (LECs) to offer, “to the extent technically feasible, number portability in accordance with requirements prescribed by the FCC.”¹⁰⁸ Number portability is defined as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”

78. On November 8, 2007, the Commission released the *Porting Information Order, Declaratory Ruling, and NPRM*,¹⁰⁹ which, among other things, extended LNP obligations to

¹⁰³ *Id.* at 13100-11, paras. 88-132.

¹⁰⁴ *Id.* at 13112-16, paras. 133-47.

¹⁰⁵ *Id.* at 13070, para. 19; *see also id.* at 13065, para. 4 (“Because of the historically open architecture of the Internet, it has been equally accessible to anyone with a basic knowledge of its protocols. As a platform for commerce, it does not distinguish between a budding entrepreneur in a dorm room and a Fortune 500 company.”); 13084, para. 51 (citing section 257 to support the Commission’s goal of “promot[ing] innovation and investment with respect to the Internet”), 13085, para. 52 (citing section 257 to support the “key goal” of “[p]romoting competition for Internet access and Internet content, applicatinos and sevicees”), 13088, para. 62 (“The Commission has recognized that the historically open architecture of the Internet has facilitated entrepreneurs’ entry into the market with new Internet services and promoted the Act’s policies favoring ‘a diversity of media voices’ and ‘technological advancement.’”).

¹⁰⁶ *Id.* at 13085, para. 53 n.123; *see also id.* at 13095-97, paras. 75-78.

¹⁰⁷ In April 2010, the United States Court of Appeals for the District of Columbia Circuit held that the Commission’s 2008 *Comcast* order failed to identify any express statutory delegation of authority for stopping Comcast’s interference with its customers’ lawful communications. *Comcast v. FCC*, 600 F.3d 642. In June 2010, the Commission issued a Notice of Inquiry to gather broad public input on the best way to resolve legal issues raised by the decision. *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd 7866 (2010). In December 2010, the Commission issued final *Open Internet* rules. *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010).

¹⁰⁸ 47 U.S.C. § 251(b)(2).

¹⁰⁹ *Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization*, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket Nos. 95-116, 99-200, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007) (*Porting Information Order, Declaratory Ruling, and NPRM*), *aff’d sub nom. National Telecomms. Cooperative Ass’n v.*

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interconnected VoIP providers, thus ensuring that interconnected VoIP customers have the same ability to keep their telephone numbers when changing telephone service providers as customers of traditional telephone service. The Commission expanded the term “intermodal ports” to include ports involving interconnected VoIP services, in addition to wireline-to-wireless ports and wireless-to-wireline ports.¹¹⁰ The Commission also clarified that no entities obligated to provide LNP may obstruct or delay the porting process by demanding from the porting-in entity information in excess of the minimum needed to validate the customer’s request and accomplish the port.¹¹¹ In the *NPRM* portion of the item, the Commission sought comment on whether it should extend other LNP and numbering obligations to interconnected VoIP providers, and whether it should adopt specific rules regarding the LNP validation process and porting interval lengths.¹¹² The Commission also tentatively concluded that it should adopt rules reducing the porting interval for simple wireline-to-wireline and intermodal port requests to 48 hours.¹¹³

79. The Commission subsequently released the *Porting Intervals Order and FNPRM*¹¹⁴ on May 13, 2009. The *Order*, which adopted a one-business-day porting interval for simple wireline-to-wireline and intermodal ports, became effective on July 2, 2009. Under the *Order*, providers have nine months from that date to implement the one-business day porting interval for simple ports, while small providers have 15 months.¹¹⁵ The Commission directed the North American Numbering Council (NANC) to develop new LNP provisioning process flows that take into account the shortened porting interval, address how a “business day” should be construed, and generally how the porting time should be measured.¹¹⁶ On November 2, 2009, the NANC submitted its recommendation. Delays in porting cost consumers time and money and limit consumer choice and competition, because consumers often abandon efforts to switch providers when they get frustrated with slow porting. The *FNPRM* sought comment on what steps, if any, the Commission should take to improve the process of changing providers.¹¹⁷ On December 8, 2009, the Wireline Competition Bureau released a Public Notice seeking comment on two proposals regarding the number of fields needed for completing simple ports within the one-business-day porting interval.¹¹⁸

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FCC, 563 F.3d 536 (D.C. Cir. 2009).

¹¹⁰ 22 FCC Rcd 19531, 19540-43, paras. 17-20.

¹¹¹ The Commission concluded that, for simple ports, LNP validation should be based on no more than four fields: (1) 10-digit telephone number; (2) customer account number; (3) 5-digit ZIP code; and (4) pass code (if applicable). *Id.* at 19557, para. 48.

¹¹² *Id.* at 19561, para. 59.

¹¹³ *Id.* at 19561-62, para. 60.

¹¹⁴ *Local Number Portability Porting Interval and Validation Requirements*, WC Docket No. 07-244, *Telephone Number Portability*, CC Docket No. 95-116, Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6084 (2009) (*Porting Intervals Order and FNPRM*).

¹¹⁵ *Id.* at 6091-92, paras. 11-12.

¹¹⁶ *Id.* at 6090, para 10.

¹¹⁷ *Id.* at 6095, para. 19.

¹¹⁸ *See Comment Sought on Proposals for Standardized Data Fields for Simple Port Requests*, WC Docket No. 07-244, Public Notice, 24 FCC Rcd 14423 (Wireline Comp. Bur. 2009); 75 Fed. Reg. 5013 (Feb. 1, 2010). On May 20, 2010, the Commission released the *LNP Standard Fields Order*, which adopted standardized data fields for simple number porting to streamline the port process and enable service providers to accomplish simple wireline-to-wireline and intermodal ports within one business day. *Local Number Portability Porting Interval and Validation Requirements*, *Telephone Number Portability*, WC Docket No. 07-244, CC Docket No. 95-116, Report and Order, 25 FCC Rcd 6953 (2010) (*LNP Standard Fields Order*). In addition, the Commission adopted the NANC’s

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80. By enabling end users to retain their telephone numbers when changing service providers, LNP facilitates the successful entrance of new service providers by eliminating one disincentive to switch carriers, thereby enhancing competition.¹¹⁹ The Commission's LNP orders addressed delays in and obstruction of the LNP process, which should benefit small businesses and entrepreneurs.

3. Customer Privacy/CPNI

81. Section 222(b) of the Act states: "A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." On February 11, 2008, Bright House Networks, LLC, Comcast Corporation, and Time Warner Cable Inc. filed a complaint alleging that Verizon was violating this section by contacting complainants' customers after a number port request was submitted to Verizon, and encouraging the customers to remain with Verizon. On June 23, 2008, the Commission's *Bright House Order*¹²⁰ concluded that Verizon was violating section 222(b) of the Act by using, for customer retention marketing purposes, proprietary information of other carriers that it receives in the local number porting process. This order benefits small carriers by ensuring other carriers cannot use the small carriers' number porting requests to help them compete for customers.

4. 911 Service

82. On July 23, 2008, Congress enacted the New and Emerging Technologies 911 Improvement Act of 2008 (NET 911 Act).¹²¹ On October 21, 2008, in the *NET 911 Access Order*, the Commission adopted rules implementing certain provisions of that Act.¹²² These rules ensure that interconnected VoIP providers have access to any and all capabilities they need to provide 911 and E911 service in full compliance with the Commission's rules.¹²³ Specifically, the order gives interconnected VoIP providers a right to access any and all capabilities necessary to provide 911 or E911 service.¹²⁴ Interconnected VoIP providers may obtain these capabilities from any entity that owns or controls them,¹²⁵ but may not use 911 and E911 capabilities obtained pursuant to the NET 911 Act or the Commission's implementing rules for any purpose other than to provide 911 or E911 service.¹²⁶ The *Net*

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recommendations for porting process provisioning flows and for counting a business day in the context of number porting, and adopted a rule to aid in implementing the one-business day simple porting interval.

¹¹⁹ As of June 2009, 104 million assigned numbers (including wireless and wireline) were in ported status, comprising approximately 15% of the 668.5 million total assigned numbers. Industry Analysis and Technology Division, Wireline Competition Bureau, *Numbering Resource Utilization in the United States* (February 2010), Tables 1, 15, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296480A1.pdf.

¹²⁰ *Bright House Networks, LLC v. Verizon California, Inc.*, File No. EB-08-MD-002, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008), *aff'd sub nom. Verizon California, Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

¹²¹ New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, 122 Stat. 2620 (2008) (NET 911 Act) (amending Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999) (Wireless 911 Act)).

¹²² *Implementation of the NET 911 Improvement Act of 2008*, WC Docket No. 08-171, Report and Order, 23 FCC Rcd 1588408-249 (rel. Oct. 21, 2008) (*NET 911 Access Order*).

¹²³ *Id.* at 15892-92, paras. 21-29.

¹²⁴ *Id.* at 15895-96, para. 25-27.

¹²⁵ *Id.* at 15896, para. 28.

¹²⁶ *Id.* at 15895-96, para. 26.

911 Access Order further provides that interconnected VoIP providers may obtain such capabilities under rates, terms, and conditions that are reasonable.¹²⁷ To protect the security of the nation's emergency services network, the *NET 911 Access Order* requires interconnected VoIP providers to comply with all applicable industry network security standards to the same extent as traditional telecommunications carriers when they access 911 and E911 capabilities traditionally used by carriers.¹²⁸ The Commission also stated that no entity may use customer information obtained as a result of the provision of 911 or E911 services for marketing purposes.¹²⁹

83. In enacting the Net 911 Act, Congress recognized the critical importance of a ubiquitous, effective, and secure 911 and E911 network to the nation's public safety. Congress also recognized that interconnected VoIP providers must have access to 911 and E911 capabilities in order to provide reliable 911 and E911 services, and directed that the Commission adopt rules mandating such access. In implementing this statutory directive in the *NET 911 Access Order*, the Commission benefited small interconnected VoIP providers by providing them certainty regarding their access to the 911 and E911 capabilities needed to provide 911 and E911 services equivalent to those their competitors offer. This access, in turn, reduces the barriers interconnected VoIP providers face in seeking to compete against larger rivals in the provision of voice communications services.

5. Interconnection

84. Section 251 of the Communications Act grants "telecommunications carriers" certain rights, including the right "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."¹³⁰ In March 2006, Time Warner Cable (TWC) filed a petition for declaratory ruling requesting that the Commission affirm that section 251 entitles competitive LECs to interconnect with incumbent LECs for the purpose of exchanging traffic on behalf of VoIP providers.¹³¹ TWC also requested that the Commission clarify that interconnection rights under section 251 are not based on the identity of the requesting carrier's customer.¹³² These issues arose because certain rural incumbent LECs had refused to interconnect with companies that were offering wholesale telecommunications services to TWC that TWC, in turn, used as inputs for VoIP services it offered to end users.

85. In the *Time Warner Cable Declaratory Ruling*,¹³³ the Wireline Competition Bureau conditionally granted TWC's requests. The Bureau held that wholesale telecommunications carriers have the same statutory rights to interconnect with incumbent LECs as retail telecommunications carriers,¹³⁴ and that the interconnection rights of a wholesale telecommunications carrier do not depend on the

¹²⁷ *Id.* at 15897, para. 31.

¹²⁸ *Id.* at 15901, para. 38.

¹²⁹ *Id.* at 15901, para. 39.

¹³⁰ 47 U.S.C. § 251(a)(1).

¹³¹ Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55 (filed Mar. 1, 2006) (TWC Petition).

¹³² *Id.*

¹³³ *Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) (*Time Warner Cable Declaratory Ruling*).

¹³⁴ *Id.* at 3517-120, paras. 9-14.

regulatory classification of the retail service offered to end users.¹³⁵ As a condition to the exercise of the interconnection rights affirmed in the Order, the Bureau required that, when the incumbent LEC wins back a customer from a VoIP provider, a VoIP provider's interconnecting wholesale carrier must port the customer's number back to the incumbent LEC at the customer's request.¹³⁶ The Bureau also conditioned the exercise of those rights on the wholesale carrier's assuming responsibility, under a section 251 arrangement between the wholesale carrier and the incumbent LEC, for compensating the incumbent LEC for terminating traffic to end users.¹³⁷

86. The *Time Warner Cable Declaratory Ruling* benefits small communications services providers by ensuring that their wholesale carriers can interconnect with incumbent LECs for purposes of transmitting traffic to VoIP providers. The declaratory ruling thus helps small businesses that wish to provide interconnected VoIP service to end users. A contrary decision would have impeded wholesale telecommunications competition, facilities-based VoIP competition, and broadband deployment by limiting the ability of wholesale carriers to offer service to VoIP providers, to the detriment of important Commission policies.

6. Multi-Tenant Environments

87. On March 19, 2008, the Commission adopted the *Competitive Networks Order*,¹³⁸ which prohibits carriers from entering into contracts that would make them the exclusive provider of telecommunications services in residential multiple tenant environments (MTEs), such as apartment buildings, condos, and co-ops. The Commission further determined that carriers may not enforce existing exclusivity contracts.¹³⁹ By placing essentially the same restrictions on telecommunications carriers as were placed on cable operators in 2007 in the *Video Services Order*,¹⁴⁰ the Commission established regulatory parity among competitors to serve MTE residents, and made its policies regarding those competitors competitively neutral. Given that the same facilities can be used to provide video, voice, and data services, the prohibition against exclusive contracts promotes competition between cable operators and telecommunications carriers to provide each of those services. These actions advance the policy of promoting facilities-based competition, which in turn should extend the availability of broadband Internet access services, to the benefit of small information services providers.

7. Universal Service

88. In section 254 of the Act, Congress established federal universal service support mechanisms to ensure the delivery of affordable telecommunications service to consumers in all areas of the nation. In that section, Congress directed the Commission to base its policies for the preservation and advancement of universal service upon a number of principles, including: ensuring comparability between urban and rural rates and services;¹⁴¹ promoting access to the public network by low-income

¹³⁵ *Id.* at 3520-22, paras. 15-16.

¹³⁶ *Id.* at 3522, para. 16.

¹³⁷ *Id.* at 3522-23, para. 17.

¹³⁸ *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, WT Docket No. 99-217, 23 FCC Rcd 5385, 5387-91, paras. 8-13 (2008) (*Competitive Networks Order*).

¹³⁹ *Id.*

¹⁴⁰ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) (*Video Services Order*), *aff'd sub nom*, *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

¹⁴¹ 47 U.S.C. § 254(b)(3).

consumers;¹⁴² promoting the availability of telecommunications and advanced services in all regions of the nation;¹⁴³ and effecting access to telecommunications and advanced services by schools, libraries, and rural health care providers.¹⁴⁴

89. Since the *2006 Report*, the Commission, through its universal service programs, took actions to advance and sustain universal service in accordance with the principles of section 254 of the Act. In addition, while promoting the goals of universal service, the Commission's actions consistently considered the impact of its policies on small entities. As the examples provided below indicate, the Commission often recognizes the important role played by and unique circumstances faced by small entities in the communications marketplace.

a. Call Home Act Implementation

90. In January 2007, the Commission approved an order implementing section 2(a) of the Call Home Act of 2006, which directed the Commission to "take such action as may be necessary to reduce the cost of calling home for Armed Forces personnel."¹⁴⁵ In that order, the Commission granted forbearance from the contribution requirements of sections 254(d) and 225(d)(3)(B) of the Act, and their implementing rules, to exempt from universal service and Telecommunications Relay Services (TRS) fund contribution requirements revenue from calls covered by section 2(a) of the Call Home Act.¹⁴⁶ Exempt revenues included, but were not limited to, calls made using prepaid calling cards and post-paid calling cards, and collect calls made by Armed Forces personnel stationed abroad.¹⁴⁷

91. By granting forbearance from the contribution requirements of sections 254(d) and 225(d)(3)(B) of the Act, the Commission eased regulatory burdens on small companies that supply telephone services to Armed Forces personnel deployed overseas. This action also promoted competition in the market for the provision of telephone services because it made the contribution exemptions available to any telecommunications provider that offered the telecommunications services at issue in the Call Home Act.¹⁴⁸ Additionally, the Commission noted that, by exempting calls made by Armed Forces personnel from universal service and TRS contribution obligations, dedicated members of the military would obtain lower prices for the phone services needed to call family and friends in the United States.¹⁴⁹

b. High Cost Support

(i) ETC Designation

92. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) [of the Act] shall be eligible to receive specific Federal universal service support."¹⁵⁰ Pursuant to section 214(e)(1) of the Act, common carriers designated as eligible telecommunications carriers (ETCs) must offer and advertise the services supported by the federal

¹⁴² 47 U.S.C. § 254(j).

¹⁴³ 47 U.S.C. § 254(b)(2).

¹⁴⁴ 47 U.S.C. § 254(h).

¹⁴⁵ Call Home Act of 2006, Pub. L. No. 109-459, § 2(a), 120 Stat. 3399 (2006) (Call Home Act).

¹⁴⁶ See *Implementation of the Call Home Act of 2006*, WC Docket No. 07-2, Order, 22 FCC Rcd 1030, 1031-32, para. 2 (2007).

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* at 1033, para. 8.

¹⁴⁹ See *id.* at 1030, para. 1.

¹⁵⁰ 47 U.S.C. § 254(e).

universal service mechanisms throughout the designated service area.¹⁵¹ Section 214(e)(2) of the Act gives state commissions the primary responsibility for designating carriers as ETCs.¹⁵² However, section 214(e)(6) directs the Commission, upon request, to designate as an ETC “a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission.”¹⁵³ Concerning areas served by a rural telephone company, the Commission may designate more than one common carrier as an ETC for a designated service area, consistent with the public interest and provided that the requesting carrier meets the requirements of section 214(e)(1).¹⁵⁴

93. In January 2007, the Bureau granted a petition for ETC designation by Hopi Telecommunications, Inc. (Hopi), a tribally-owned wireline provider, to be designated as an ETC on the Hopi Reservation and on a small part of the Navajo reservation in Arizona.¹⁵⁵ The following month, the Bureau granted a petition by Smith Bagley, Inc. (SBI), a commercial mobile radio service (CMRS) provider, which sought designation as an ETC on the Navajo Reservation in Utah.¹⁵⁶ These orders promoted the availability of telephone service for customers in rural and Tribal areas, providing access to services that might not otherwise be available in these areas. The Bureau noted, for instance, that ETC designation would allow Hopi to construct facilities to provide service to otherwise unserved portions of a study area.¹⁵⁷ Similarly, the Bureau found that designation of SBI as an ETC would provide increased consumer choice and a wider availability of service offerings.¹⁵⁸ In addition, by granting ETC designation to carriers such as Hopi and SBI, the Bureau ensured that providers – especially the small, rural carriers that frequently serve these areas – have both the financial incentive and the ability to provide telephone service to the nation’s rural and Tribal areas. In 2008, the Commission conditionally designated TracFone Wireless, Inc. (TracFone), a non-facilities-based CMRS provider (*i.e.*, a pure wireless reseller), an ETC for the limited purpose of receiving universal service low-income Lifeline support, following the Commission’s grant of TracFone’s petition for forbearance from the requirement that a carrier designated as an ETC provide services, at least in part, over its own facilities.¹⁵⁹ The Commission extended similar relief to Virgin Mobile USA, L.P. (Virgin Mobile), another pure wireless reseller, in 2009.¹⁶⁰ Collectively, these actions demonstrated the Commission’s commitment to ensuring

¹⁵¹ 47 U.S.C. § 214(e)(1).

¹⁵² *Id.* at § 214(e)(2).

¹⁵³ *Id.* at § 214(e)(6).

¹⁵⁴ *Id.*

¹⁵⁵ *Federal-State Joint Board on Universal Service, Hopi Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Hopi Reservation in Arizona*, CC Docket No. 96-45, Order, 22 FCC Rcd 1866 (Wireline Comp. Bur. 2007) (*Hopi ETC Designation Order*).

¹⁵⁶ *Federal-State Joint Board on Universal Service, Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah*, CC Docket No. 96-45, Order, 22 FCC Rcd 2479 (Wireline Comp. Bur. 2007) (*SBI ETC Designation Order*).

¹⁵⁷ *See Hopi ETC Designation Order*, 22 FCC Rcd at 1873, para. 20.

¹⁵⁸ *See SBI ETC Designation Order*, 22 FCC Rcd at 2487, para. 23.

¹⁵⁹ *Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, et al.*, CC Docket No. 96-45, Order, 23 FCC Rcd 6206, 6214-15, para. 21 (2008) (*TracFone ETC Designation Order*); *See Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Rcd 15095, 15098, para. 6 (2005) (*TracFone Forbearance Order*).

¹⁶⁰ *Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A); Petition for Designation as an Eligible Telecommunications Carrier in the State of New York; Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania; Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia; Petition for Limited Designation as an Eligible*

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that rural and tribally-owned carriers have access to the universal service funds needed to serve their respective communities.

(ii) **Interim Cap Orders**

94. In May 2008, based on a recommendation of the Federal-State Joint Board on Universal Service, the Commission adopted an interim, emergency cap on the amount of high-cost universal service support available to competitive ETCs.¹⁶¹ The Commission concluded that an interim cap was needed to curb the significant growth in the amount of high-cost universal service support received by competitive ETCs, as the rate of growth between 2001 and 2007 – more than 100 percent – threatened the continued stability of the fund.¹⁶² Consequently, in the *Interim Cap Order* the Commission limited, on an interim basis, the annual high-cost support amount available to competitive ETCs in each state to the amount competitive ETCs were eligible to receive in that state during March 2008, on an annualized basis.¹⁶³

95. The Commission, however, adopted a limited exception to the interim support cap for competitive ETCs serving Tribal Lands or Alaska Native regions, which would allow them to continue receiving support at uncapped levels.¹⁶⁴ The Commission stated that the low penetration rates for basic telephone service in Tribal Lands warranted implementation of the “Covered Locations” exception, as it was likely that competitive ETCs did not provide complementary services in those areas, but rather served as primary providers of telecommunications services.¹⁶⁵ Moreover, the Commission noted that it adopted the Covered Locations exception as part of its consideration of the effects of the interim support cap on small businesses.¹⁶⁶ As such, in adopting the *Interim Cap Order* and Covered Locations exception, the Commission balanced the importance of the continued stability of the high-cost fund with the needs of the small carriers serving Tribal and rural populations to ensure that these carriers will continue to receive the universal service support essential for them to serve these uniquely-situated areas.

96. The Commission provided further assistance to small carriers serving Tribal Lands or Alaska Native regions in March 2009, by granting a waiver of the restriction in the *Interim Cap Order* that limited the availability of uncapped per-line support for competitive ETCs serving Tribal Lands or

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Telecommunications Carrier in the State of North Carolina; Petition for Limited Designation as an Eligible Telecommunications Carrier in the State of Tennessee, CC Docket No. 96-45, Order, 24 FCC Rcd 3381 (2009) (*Virgin Mobile ETC Designation Order*). In 2010, the Commission granted several additional carriers the same forbearance so that they could participate in the Lifeline program, but denied requests to extend that forbearance to participation in the Commission’s Link Up program. See *Federal-State Joint Board on Universal Service; Telecommunications Carriers Eligible for Universal Service Support; i-wireless, LLC Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A)*, CC Docket No. 96-45, WC Docket No. 09-197, Order, 25 FCC Rcd 8784 (2010); *Telecommunications Carriers Eligible for Universal Service Support; Federal-State Joint Board on Universal Service; Head Start Petition for Forbearance; Consumer Cellular Petition for Forbearance; Midwestern Telecommunications Inc. Petition for Forbearance; Line Up, LLC Petition for Forbearance*, WC Docket No. 09-197, CC Docket No. 96-45, Order, 25 FCC Rcd 10510 (2010); *Telecommunications Carriers Eligible for Universal Service Support; Federal-State Joint Board on Universal Service; Conexions Petition for Forbearance*, WC Docket No. 09-197, CC Docket No. 96-45, Order, 25 FCC Rcd 13866 (2010).

¹⁶¹ *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) (*Interim Cap Order*).

¹⁶² *Id.* at 8837-38, paras. 6-7.

¹⁶³ *Id.* at 8837, para. 5.

¹⁶⁴ *Id.* at 8848, para. 32.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* at 8943, Appendix D, para. 17.

Alaska Native regions to one payment per residential account.¹⁶⁷ In this order, the Commission determined that competitive ETCs serving Covered Locations who opted into the exception would receive uncapped high-cost support for all lines served in those Covered Locations pursuant to section 54.307 of the Commission's rules.¹⁶⁸ The Commission found that waiver of the limitation contained in the Covered Locations exception of the *Interim Cap Order* was necessary to encourage the deployment of high quality telephone service on Tribal Lands and in Alaska Native regions.¹⁶⁹ By allowing competitive ETCs in Covered Locations to receive uncapped high-cost support for all lines served, the Commission's action enables small carriers to continue to have the ability and the incentive to serve regions of the country where the need for high-cost support is most acute.¹⁷⁰

(iii) High-Cost Waivers

97. The Commission may, on its own motion, waive any provision of its own rules. The waiver process requires a showing of good cause to waive a rule and affords the Commission an opportunity to make its determination based on the specific circumstances encountered by an individual carrier. Over the last three years, the Commission, through delegated authority to the Bureau, has granted numerous requests for waivers of the Commission's high-cost rules, including granting requests for relief from small, rural carriers.¹⁷¹

¹⁶⁷ *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 24 FCC Rcd 3369 (2009).

¹⁶⁸ *Id.* at 3371, para. 7.

¹⁶⁹ *See id.* at 3371-72, paras. 8-9.

¹⁷⁰ *See id.* at 3372, para. 9.

¹⁷¹ The Bureau granted several high-cost and study area waivers in the past three years. Some of these waivers applied to rural carriers, which are defined as carriers with fewer than 100,000 lines and therefore include small carriers. *See, e.g., MTA Communications Inc. d/b/a MTA Wireless*, CC Docket No. 96-45, Order, 22 FCC Rcd 964 (Wireline Comp. Bur. 2007) (allowing MTAW to receive universal service support as of the date of its designation as an ETC, ensuring that the small company could continue providing uninterrupted service to its customers); *Bristol Bay Cellular Partnership*, CC Docket No. 96-45, Order, 22 FCC Rcd 21500 (Wireline Comp. Bur. 2007) (allowing Bristol Bay to file line count data based on the service area in which its wireless customers exclusively or primarily use their wireless service, which allowed Bristol Bay to receive high-cost universal service support despite a unique billing situation); *Saddleback Communications, Gila River Telecommunications, Inc., and Pine Belt Cellular, Inc.*, CC Docket No. 96-45, Order, 23 FCC 11552 (Wireline Comp. Bur. 2008) (granting petitions for waiver filed by Saddleback, Gila River, and Pine Belt, seeking waiver of the annual ETC filing deadlines, an action that was supported by the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)); *Northeast Iowa Telephone Company*, WC Docket No. 08-71, CC Docket No. 96-45, Order, 24 FCC Rcd 4818 (Wireline Comp. Bur. 2009) (granting a waiver of the data submission reporting deadline for local switching support, because the Commission found that denial of support may have a significant effect on the small carrier's rates and ability to continue providing quality service to its customers); *SRT Communications, Inc. and North Dakota Telephone Company*, CC Docket No. 96-45, Order, 22 FCC Rcd 6699 (Wireline Comp. Bur. 2007) (granting waiver of study area boundary freeze, allowing rural company to avoid the burden and costs of filing its own interstate tariffs); *Sacred Wind Communications, Inc. and Qwest Corporation*, CC Docket No. 96-45, Order, 23 FCC Rcd 12917 (Wireline Comp. Bur. 2008) (extended the timing of a previously granted study area waiver for an additional period because the Bureau found that failure to do so would impair Sacred Wind's ability to provide affordable, uninterrupted service to its customers and would be inconsistent with section 254 of the Act).

8. Special Access

98. In 2007, the Bureau sought to update the record in the special access proceeding. In 2005, the Commission had released the *Special Access NPRM*,¹⁷² noting that an examination of the state of competition in the marketplace is critical to a determination of whether the Commission's pricing flexibility rules have worked as intended. The Bureau sought to refresh the record in that proceeding in light of a number of developments, including: 1) a number of significant mergers and other industry consolidations;¹⁷³ 2) the continued expansion of intermodal competition in the market for telecommunications services, 3) the release by GAO of a report summarizing its review of certain aspects of the market for special access services;¹⁷⁴ and 4) rapid changes in fiber technologies.¹⁷⁵

99. In 2009, the Bureau asked parties to comment on an appropriate analytical framework for examining the various issues that have been raised in the *Special Access NPRM*.¹⁷⁶ The Bureau explained that "the Commission would benefit from a clear explanation by the parties of how it should use data to determine systematically whether the current price cap and pricing flexibility rates are working properly to ensure just and reasonable rates, terms, and conditions and to provide flexibility in the presence of competition."¹⁷⁷ This proceeding will help ensure that the rates, terms and conditions for special access services available to small businesses and entrepreneurs are just and reasonable.¹⁷⁸

E. Office of Engineering and Technology

100. The Office of Engineering and Technology (OET) took a number of actions in the last three years that will remove barriers and lessen burdens for small businesses. These actions include those specifically intended to do so, and those of a more general nature that will result in such effects. It reduced time to market and regulatory costs by pursuing additional Mutual Recognition Agreements (MRA) to ease the marketing of domestically-produced devices in other countries. It also expanded its Electronic Equipment Authorization System to provide full integration of new policies and regulations in

¹⁷² *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*).

¹⁷³ See, e.g., *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, Order on Reconsideration, 22 FCC Rcd 6285 (2007); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005); see also *Notice of Streamlined Domestic 214 Applications Granted, Transfer of Control of Looking Glass Networks Holding Co. Inc. to Level 3 Communications Inc.*, WC Docket No. 06-116, Public Notice, 21 FCC Rcd 8709 (2006).

¹⁷⁴ Government Accountability Office, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report 07-80 (Nov. 2006).

¹⁷⁵ *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, Public Notice, 22 FCC Rcd 13352 (2007) (*Refresh the Record PN*).

¹⁷⁶ *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, DA 09-2388 (rel. Nov. 5, 2009) (*Analytical Framework PN*).

¹⁷⁷ *Analytical Framework PN* at 2.

¹⁷⁸ In 2010, Commission staff held a public workshop to discuss the analytical framework the Commission should use. *Wireline Competition Bureau Announces July 19, 2010 Staff Workshop to Discuss the Analytical Framework for Assessing the Effectiveness of the Existing Special Access Rules*, Public Notice, 25 FCC Rcd 8458 (WCB 2010). The Bureau also requested the public to submit data voluntarily to assist the Commission in evaluating the issues that have been raised in the proceeding. *Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd 15146 (WCB 2010).

a number of respects. Additionally, OET further reduced time to market and regulatory costs for these devices by refining a web based inquiry system to provide speedy and consistent answers to questions about equipment authorization procedures and rules. To provide additional entrepreneurial opportunities and to provide better tools for all businesses, the Commission modified the rules for advanced ultra-wideband (UWB) technology; permitted innovative unlicensed devices to use the TV broadcast spectrum on a secondary basis; provided for the introduction of the Mobile-Satellite Service (MSS) and ancillary terrestrial services in the 2 GHz band now used by Broadcast Auxiliary Services (BAS); facilitated the introduction of wireless broadband services in the 3650 MHz band; finalized rules for advanced medical radio communication devices in the 400 MHz band; and proposed rules for a new wireless medical monitoring service in the 2/5 GHz band. Finally, the Commission facilitated the development of a spectrum-sharing test-bed to study the feasibility of more intensive use of shared federal/non-federal 400 MHz spectrum to provide additional spectrum availability and better tools to individuals and businesses, and to provide a business opportunity for the development of Dynamic Spectrum Access devices.

1. Mutual Recognition Agreements

101. The Commission expanded its MRAs with other countries, whereby the signatories to an MRA mutually agree to recognize the validity of equipment authorizations sanctioned by the other countries, thereby greatly increasing the ease of international marketing for makers of all kinds of equipment. During the past three years, the United States signed an MRA with Japan in February 2007 and with Vietnam in June 2008. There are hundreds of organizations designated as Conformity Assessment Bodies to test or approve equipment to foreign technical requirements, and the list – as well as the list of participating countries – continues to grow. The majority of Conformity Assessment Bodies located in the United States are small businesses. These measures thus enhance market opportunities for small businesses and manufacturers that supply parts and services to telecommunications service providers, and also to those that engage in compliance testing of equipment, most of which are small start-up enterprises. These measures also promote competition in the provision of telecommunications products and electronic equipment and, in turn, speed delivery of products to the public.

2. Electronic Equipment Authorization

102. Upgrades to the Commission's database of equipment authorization records have automated the full integration of new policies and regulations into equipment authorization processing. For instance, Commission rulemakings and new policies introduced upgrades to reflect new technology developments in cognitive radio/software defined radio; provide for electronic filing of changes to grantee code demographic information and information related to transfer in control of business ownership; implement a new short term confidentiality procedure to allow shipping and distribution of authorized equipment, while maintaining the confidentiality of information available to the public after marketing; streamlining of the Telecommunications Certification Bodies (TCB) processes to further ensure consistency in the processing of applications by all TCBs; and revision of the monitoring and assessment of TCBs, to ensure that TCBs are operating in a manner consistent with the rules, and in a manner that demonstrates that TCBs are providing excellent service in acting on behalf of the Commission to issue grants of authorization.

3. Knowledge Data Base (KDB)

103. The Commission has developed a web-based inquiry system to help answer questions about equipment authorization procedures and rules. The inquiry system and the associated archive collectively is part of a Knowledge Data Base (KDB) system. The Commission has continued to develop and improve the KDB, which also provides published records of Commission policies and staff rule interpretations; and a template for the equipment authorization public to request information and present inquiries. The published records are fully searchable, and are updated and maintained based on current technology trends and new policies and procedures. In addition, the web interface in the KDB provides the public with a vehicle to request information or responses to inquiries. The KDB provides a database

of previous responses, as well as publications, for Commission staff to review to ensure standardization in providing information and to facilitate rapid response.

4. Ultra-Wideband Technology

104. In November 2008, the Commission issued an *Order* granting in part a request submitted by UltraVision Security Systems, Inc. (UltraVision) for a waiver of the rules to allow limited marketing of its UltraSensor UWB surveillance systems.¹⁷⁹ UltraSensor is a UWB fixed radar surveillance system designed to operate in the spectrum region below 960 MHz, from 80 MHz to 600 MHz, and is intended to provide warning of intruders to sites with strategic or commercial interests. The waiver will permit the UltraSensor surveillance system to operate in the 80-600 MHz frequency band and to allow UltraVision to market the systems to any entity eligible for licensing under Part 90 of the rules. We note that, in February 2002, the Commission adopted regulations to permit the operation of UWB transmitters, and that several categories of UWB devices are permitted to be operated under the Part 15 regulations without a requirement for an individual license: imaging systems, vehicular radars, and indoor and outdoor communication systems. UWB devices are not allocated spectrum but rather use frequency bands allocated to various authorized radio services, including Federal Government services, on a sufferance basis. This action will enhance the security of commercial enterprises, including small businesses, by allowing them access to a new wireless technology.

5. New Uses for the TV Broadcast Band

105. In November 2008, the Commission adopted rules to allow unlicensed radio transmitters to operate in the broadcast television spectrum at locations where that spectrum is not being used to transmit TV signals. This spectrum is referred to as “TV white spaces.” The Commission stated in its *Second Report and Order and Memorandum Opinion and Order* that its action will make a significant amount of spectrum available for new and innovative products and services, including broadband data and other services for businesses and consumers. The Commission further stated that its decision is a conservative first step that includes many safeguards to prevent harmful interference to incumbent communications services, and that it will closely oversee the development and introduction of white space devices to the market and will take whatever actions may be necessary to avoid, and if necessary correct, any interference that may occur. Finally, the Commission stated that it will consider in the future any changes to the rules that may be appropriate to provide greater flexibility for development of this new technology and better protect against harmful interference to incumbent communications services.¹⁸⁰ The white spaces initiative may be particularly beneficial to small businesses.

6. Broadcast Auxiliary and Mobile Satellite Services at 2 GHz

106. In a March 2008 *Memorandum Opinion and Order*, the Commission granted a one year waiver of the deadline by which Sprint Nextel Corporation (Sprint Nextel) was required to complete the transition of the BAS from the 1990-2110 MHz band to frequencies above 2025 MHz, and set forth

¹⁷⁹ *UltraVision Security Systems, Inc. Request for Interpretation and Waiver of Section 15.511(a) & (b) of the Commission’s Rules for Ultra-Wideband Devices*, Order, ET Docket 06-195, 23 FCC Rcd 17632 (2008).

¹⁸⁰ *Unlicensed Operation in the TV Broadcast Bands*, ET Docket 04-186, and *Additional Spectrum for Unlicensed Devices*, ET Docket 02-380, Second Report and Order and Memorandum Opinion and Order, ET Docket 04-186, 23 FCC Rcd 16807 (2008). Seventeen parties filed petitions for reconsideration in response to the *Second Report and Order*. In September 2010, the FCC adopted a *Second Memorandum Opinion and Order* addressing the petitions for reconsideration and finalizing rules to make the unused spectrum in the TV bands available for unlicensed broadband wireless devices. *Unlicensed Operation in the TV Broadcast Bands*, ET Docket No. 04-186, *Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, Second Memorandum Opinion and Order, 25 FCC Rcd 18661 (2010). Five parties filed petitions for reconsideration of the *Second Memorandum Opinion and Order*; the Commission has not yet acted on those petitions.

specific requirements in conjunction with this transition timetable. In a companion *Further Notice of Proposed Rulemaking*, the Commission explored how to balance the needs of incumbent BAS licensees to provide service without suffering harmful interference during the transition and the introduction of new 2 GHz MSS in a timely manner.¹⁸¹ In a June 2009 *Report and Order*, the Commission waived until February 8, 2010 the BAS relocation deadline; eliminated the requirement that MSS operators not begin operations until the relocation of BAS in the thirty largest markets and all fixed BAS links in all markets is completed; addressed the interference environment during the period in which both MSS and BAS operate in the 2000-2020 MHz band by permitting the MSS entrants to conduct operations where the BAS incumbents have not been relocated if they successfully coordinate with the BAS incumbents; and waived its rules governing when an MSS operator may provide ancillary terrestrial services in relation to commercial satellite service. In a companion *Further Notice of Proposed Rulemaking*, the Commission tentatively concluded that MSS operators and future terrestrial licensees would have an obligation to share, on a *pro rata* basis, in the costs associated with the relocation of BAS incumbents if they enter the band prior to the BAS sunset date of December 9, 2013; tentatively concluded that an MSS operator enters the band and thus incurs an obligation to share in the costs associated with relocation of BAS incumbents when its satellite is found operational under its authorization milestone; sought comment on various approaches for when MSS operators should be required to reimburse Sprint Nextel for their *pro rata* shares of the relocation costs; invited additional analysis on whether MSS entrants could operate on a secondary basis without coordination where BAS incumbents have not been relocated; proposed to clarify that MSS operators retain an obligation to relocate BAS incumbents after the MSS operator begins operations; and sought comment on incentives to continue to encourage BAS licensees to complete the relocation process without unnecessary delay.¹⁸² The BAS Relocation will promote more efficient use of the spectrum and permit the introduction of new services by MSS licenses, including small businesses.

7. Wireless Operations in the 3650-3700 MHz Band

107. In May 2007, the Commission addressed three petitions for reconsideration filed in response to its 2005 *Report and Order*.¹⁸³ In a proceeding relating to the 3650-3700 MHz band (3650 MHz band). In its 2007 *Memorandum Opinion and Order*, the Commission affirmed that previous decision to create a spectrum environment that will encourage multiple entrants and stimulate the expansion of broadband service to rural and under served areas.¹⁸⁴ To facilitate rapid deployment in the band, the Commission also maintained its non-exclusive licensing scheme. Additionally, the Commission declined to reconsider the requirement that equipment operating in the 3650 MHz band incorporate a “contention-based protocol” – a technology that permits multiple licensees to share spectrum by ensuring that all licensees receive reasonable opportunities to operate in the band. In response to the record, the Commission modified its rules by defining two categories of the contention based protocol – restricted and unrestricted. Equipment operating with a restricted contention based protocol was limited to the

¹⁸¹ *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, WT Docket 02-55 *et al.*, 23 FCC Rcd 4393 (2008).

¹⁸² *Improving Public Safety Communications in the 800 MHz Band*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket 02-55 *et al.*, 24 FCC Rcd 7904 (2009). In September 2010, the Commission issued an order concluding the efforts to relocate the BAS. The decision addressed the outstanding matter of Sprint’s inability to agree with MSS operators in the band on the sharing of the costs to relocate the BAS incumbents. The item mostly adopted the cost sharing proposals made in the June 2009 *Further Notice. Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling, FCC 10-179, 25 FCC Rcd 13874 (2010).

¹⁸³ See *Wireless Operations in the 3650-3700 MHz Band*, ET Docket No. 04-151, Report & Order, 20 FCC Rcd 6502 (2005).

¹⁸⁴ See *Wireless Operations in the 3650-3700 MHz Band*, ET Docket No. 04-151, Memorandum Opinion and Order, 22 FCC Rcd 10421 (2007).

lower 25 megahertz portion of the 3650 MHz band while the equipment employing an unrestricted protocol could operate across the entire band. This action provided an avenue for the quick deployment of existing equipment to rural and underserved communities. The Commission found that this modification would facilitate operation of the widest variety of broadband technologies with minimal risk of interference, and would further reduce the potential for co-channel interference, provide additional protections to the multiple users in the band under the current licensing regime, and create incentives for the rapid development of broadly compatible contention-based technologies. Actions taken in the 3650 MHz band have eliminated market entry barriers for entrepreneurs and other small businesses.

8. Medical Device Radio Communication Service

108. In a March 2009 *Report and Order*, the Commission adopted rules establishing a new service for advanced medical radio communication devices in the 401-406 MHz band.¹⁸⁵ An increasing number of medical devices are coming to rely upon radio transmissions for critical aspects of their functionality, and these devices are improving the health care of all Americans by providing relief and recovery of function from many types of illness and injury. The new MedRadio Service incorporates the existing Medical Implant Communications Service band at 402-405 MHz, and also includes two megahertz of newly designated spectrum in the adjacent bands at 401-402 MHz and 405-406 MHz. Altogether, the MedRadio Service now provides a total of five megahertz of contiguous spectrum on a secondary basis and non-interference basis for advanced wireless medical radiocommunication devices used for diagnostic and therapeutic purposes in humans. The new MedRadio Service accommodates the operation of body-worn as well as implanted medical devices, including those using either listen-before-talk (LBT) frequency monitoring or non-LBT spectrum access methods, in designated portions of the 401-406 MHz band. The Commission's licensing approach does not require individual transmitter licensing, but rather is accomplished through adherence to applicable technical standards and other operating rules to minimize the administrative burden on prospective licensees. Thus, regulatory barriers to entrepreneurs and other small businesses in this new service are minimal.

9. Medical Body Area Networks

109. In June 2009, the Commission adopted a *Notice of Proposed Rulemaking* that sought comment on allocating spectrum and establishing service and technical rules for the operation of Medical Body Area Networks (MBANs). MBANs could be used to create wireless body sensor networks around individual patients to monitor an array of physiological data – such as temperature, pulse, blood glucose level, blood pressure, respiratory function and a variety of other physiological metrics. MBAN systems would primarily be used in health care facilities, with the potential also of being used in other patient care/monitoring circumstances. Unlike traditional medical telemetry systems which rely on separate uncoordinated links for each physiological function being monitored, MBAN systems could serve to wirelessly monitor all of the desired data of a single patient, which could then be aggregated and wirelessly transmitted to a remote location for evaluation. The *Notice* sought comment on options for accommodating MBAN operations in several frequency bands, and on the amount of spectrum that should be allocated for such use. More specifically, the *Notice* sought comment on the feasibility of using the 2360-2400 MHz; 2300-2305 MHz and 2395-2400 MHz; the 2400-2483.5 MHz; or 5150-5250 MHz bands for this purpose, and on various licensing schemes that would be appropriate for any of these bands under consideration. In addition, the *Notice* sought comment on tentative service and eligibility rules that

¹⁸⁵ *Investigation of the Spectrum Requirements for Advanced Medical Technologies; Amendment of Parts and 95 of the Commission's Rules to Establish the Medical Device Radio Communications Service at 401-402 and 405-406 MHz; DexCom, Inc. Request for Waiver of the Frequency Monitoring Requirements of the Medical Implant Communications Service Rules; Biotronik, Inc. Request for Waiver of the Frequency Monitoring Requirements for the Medical Implant Communications Service Rules*, Report and Order, ET Docket 06-135 *et al.*, 24 FCC Rcd 3474 (2009).

would be similar in many respects to those for other wireless body-worn and implanted medical devices operating in the MedRadio Service in the 401-406 MHz bands.¹⁸⁶

10. Spectrum Sharing Innovation Test-Bed

110. On February 5, 2008, the Commission issued a *Public Notice*¹⁸⁷ and the Department of Commerce's National Telecommunications and Information Administration (NTIA) issued a *Notice of Solicitation of Proposal*,¹⁸⁸ designating spectrum and providing guidance for participating in a Spectrum Sharing Innovation Test-Bed ("Test-Bed") program to study the feasibility of increasing the efficient use of spectrum that is shared between federal and non-federal users. In its *Public Notice*, the Commission noted that in May 2003 the President established a "Spectrum Policy Initiative" by issuing an Executive Memorandum to initiate an examination of the existing legal and policy framework for spectrum management in order to better optimize the use of U.S. spectrum assets for federal and non-federal users. The Commission was encouraged to participate in this review and to provide input to NTIA on these issues. In its joint February 2008 action, the Commission designated 10 megahertz of spectrum in the 470-512 MHz band, and NTIA designated the 410-420 MHz band, for the Test-Bed. In May 2008, NTIA identified six Test Bed participants. Since then, a working group, which includes NTIA, the FCC, and other government agencies, has met with the different participants to address any questions or comments they have regarding a three-phased Test-Bed Program. This phased approach was conceived to evaluate the ability of Dynamic Spectrum Access devices employing spectrum sensing and/or geolocation techniques to share spectrum with land mobile radio systems operating in the 410-420 MHz and 470-512 MHz bands. These bands are a fertile ground for entrepreneurs and other small businesses.

11. Summary

111. With these new allocations, rules, and spectrum management principles, the Commission anticipates the development of a broad range of new devices and communications options that will stimulate economic development and the growth of new industries, and promote the ability of manufacturers—including entrepreneurs and other small businesses—to compete more effectively in both domestic and global markets.

F. Media Bureau

112. The Media Bureau develops, recommends, and administers policy and licensing programs relating to electronic media, including cable television, broadcast television, and radio in the U.S. and its territories. The Media Bureau also handles post-licensing matters regarding Direct Broadcast Satellite service. The Media Bureau is strongly committed to the principles and policies of Section 257. As discussed below, the Media Bureau has adopted a number of measures to remove barriers to market entry for entrepreneurs and other small businesses.

1. Promoting Ownership Diversity

113. On March 5, 2008, the Commission adopted *Promoting Diversification of Ownership in the Broadcasting Services*, a Report and Order and Third Further Notice of Proposed Rulemaking ("*Diversity Order*"), which modified certain agency rules and policies to encourage ownership diversity

¹⁸⁶ *Amendment of the Commission's Rules to Provide Spectrum for the Operation of Medical Body Area Networks*, Notice of Proposed Rulemaking, ET Docket 08-59, FCC 09-57, released June 29, 2009.

¹⁸⁷ *Federal Communications Commission Designates Spectrum and Provides Guidance for Participation in a Spectrum Sharing Innovation Test-Bed*, Public Notice, ET Docket 06-89, 23 FCC Red 1654 (2008).

¹⁸⁸ NTIA Docket No. 080129095-8096-01, published in 73 Fed. Reg. 6710 (February 5, 2008).

and new entry into the broadcasting industry.¹⁸⁹ The *Diversity Order* recognized the national importance of a communications policy that supports the widest dissemination of information from different sources as essential to the welfare of the public. Many of the actions adopted by the Commission were recommendations from the Diversity FACA and have been described fully in paragraph 20 of this Report. The *Third FNPRM* sought comment on whether the Commission can or should expand its definition of “eligible entity” to include other businesses; on how best to improve its collection of data regarding the gender, race, and ethnicity of broadcast licensees; and on a number of additional proposals designed to expand ownership opportunities for new entrants and small businesses.

114. On May 5, 2009, the Commission issued a Report and Order (“323 Order”) and companion Fourth Further Notice of Rulemaking (“Fourth NPRM”) in the proceeding.¹⁹⁰ The *323 Order* adopted improvements to our Form 323 data collection in order to obtain an accurate, reliable, and comprehensive assessment of minority and female broadcast ownership and modified the filing requirements. On December 23, 2009, the Bureau temporarily suspended the filing deadline for Form 323 to investigate changes that could be made to the form to reduce the time required to complete it and to lessen any unanticipated burdens in this regard without undermining the completeness, quality, usefulness, and aggregability of the data.¹⁹¹

115. The *Fourth NPRM* tentatively concluded that obtaining gender, race, and ethnicity information from non-commercial (“NCE”) licensees would further the Commission’s goal to design policies to advance diversity in the broadcast industry. The *Fourth NPRM* sought comment on revising Form 323-E to collect this information from NCE licensees and LPFM licensees, along with the best way to define ownership of an NCE licensee, many of whom are non-profit, non-stock entities, or governmental organizations.

116. On October 16, 2009, the Commission issued a Report and Order and Fifth Further Notice of Rulemaking in this proceeding.¹⁹² On reconsideration of the *323 Order*, the Commission affirmed its prior conclusion that the biennial reporting requirement should apply to sole proprietors. It also reversed its decision to require the reporting of the two classes of non-attributable interests, and released a further notice of proposed rulemaking on the issue.

2. Exclusivity Clauses in the Provision of Video Services to Multiple Dwelling Units

117. On October 31, 2007, the Commission adopted an *Order* that prohibits the enforcement or execution of exclusivity clauses in the provision of video services by multichannel video programming distributors (“MVPD”) subject to Section 628 of the Communications Act to multiple dwelling units (“MDU”) and other real estate developments.¹⁹³ By instituting this ban on exclusivity clauses, the

¹⁸⁹ *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922 (2008).

¹⁹⁰ *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, et al., 24 FCC Rcd 5896 (2009) (“323 Order”)

¹⁹¹ *Promoting Diversification in the Broadcasting Services*, Order, 24 FCC Rcd 14628 (MB 2009). On April 8, 2010, the Bureau announced the availability of an improved Form 323 and announced a new filing deadline of July 8, 2010. *Media Bureau Announces Revised Form 323 Will be Available Online on April 9, 2010 and Sets New Filing Deadline of July 8, 2010*, Public Notice, 25 FCC Rcd 3595 (MB 2010). The Commission released the 2009 Form 323 data in February 2011.

¹⁹² *Promoting Diversification of Ownership in the Broadcasting Services*, Memorandum Opinion and Order and Fifth Further Notice of Rulemaking, 24 FCC Rcd 13040 (2009).

¹⁹³ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007).

Commission sought to foster greater competition in the market for providing video service to apartment and condominium complexes, planned communities and other real estate developments, including by small MVPDs. The Commission found that the use of exclusivity clauses between certain MVPDs and multiple dwelling units was on the rise, harming competition and discouraging other MVPDs from improving service. This *Order* was affirmed by the D.C. Circuit Court of Appeals on May 26, 2009.¹⁹⁴

118. The Commission also issued a *Further Notice of Proposed Rulemaking* which sought comment on whether a similar prohibition should be applied to DBS providers, private cable operators and other MVPDs who are not subject to Section 628 of the Communications Act.

3. Competition in the Video Distribution Market

119. On September 11, 2007, the Commission adopted an *Order* extending the ban on exclusive contracts between vertically integrated video programmers and cable operators.¹⁹⁵ By extending the ban for five years, the Commission sought to prevent video programmers affiliated with cable operators from favoring affiliated cable operators over competitive MVPDs, including many small MVPDs. The Commission stated that ensuring competitive MVPD's access to cable operator affiliated programming will foster competition in the video distribution market.¹⁹⁶

120. In the same proceeding, the Commission also issued a *Notice of Proposed Rulemaking* seeking comment on issues relating to program tying arrangements, under which some programmers require MVPDs to purchase a package of programming instead of just the programming the MVPD wants.

4. Digital Audio Broadcasting

121. On March 22, 2007, the Commission adopted a *Second Report and Order* in the Digital Audio Broadcasting proceeding.¹⁹⁷ Among other things, the *Order* allows radio stations to time broker unused digital bandwidth to third parties. The FM multicasting functionality is expected to drive demand for programming and, therefore, should expand opportunities for local small businesses that create radio programming.

5. Policies to Promote Rural Radio Service

122. On April 7, 2009, the Commission adopted a *Notice of Proposed Rulemaking* seeking comment on numerous proposed changes to our rules and procedures to better encourage the fair distribution of broadcast licenses, particularly in smaller communities, rural areas, and Tribal areas, afford greater opportunities to participate in competitive bidding, promote the filing of technically sound

¹⁹⁴ *National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir 2009).

¹⁹⁵ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket 07-29, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007), *appeal pending*, *Cablevision Systems Corp.*, No. 07-1425 (D.C. Cir.), filed 10-19-07 (lead case), *Comcast Corp.* No. 07-1987, filed 12-3-07 (consolidated case).

¹⁹⁶ In 2010, this *Order* was affirmed by the D.C. Circuit Court of Appeals. *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

¹⁹⁷ *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket No. 99-325, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344 (2007).

applications, and deter speculation.¹⁹⁸ The *Notice* specifically asked for comment on how the proposals might affect small business entities, including those owned by minorities and women.¹⁹⁹

6. Video Competition Notice of Inquiry

123. Pursuant to the Cable Television Consumer Protection and Competition Act of 1992,²⁰⁰ the FCC compiles information yearly on the status of competition in the video programming delivery market. This *Notice of Inquiry and Supplemental Notice of Inquiry* requests information, comments, and analyses that will aid the Commission in evaluating the status of competition in the video marketplace, changes in the marketplace in the last year, factors that have facilitated or impeded competition, and, most directly relevant to section 257, the effect these factors have on prospects for new entrants,

124. A *Notice of Inquiry* was released January 16, 2009.²⁰¹ A *Supplemental Notice of Inquiry* seeking updated information was released April 9, 2009.²⁰² Both *Notices* asked commenters to provide data on video programming distributors (for the next annual video competition report), including: 1) cable systems; 2) direct-to-home satellite services, including direct broadcast satellite (“DBS”) services and large home satellite dish (“C-Band”) providers; 3) other wireline providers, including local exchange carriers (“LECs”), broadband service providers (“BSPs”), open video systems (“OVS”), and utility-operated systems; 4) over-the-air broadcast television stations; 5) other wireless service providers, including commercial mobile radio services (“CMRS”) as well as wireless cable systems using frequencies in the broadband radio and educational broadband services; 6) private cable operators (“PCO” systems), also known as satellite master antenna television (“SMATV”) systems; and 7) the Internet and Internet Protocol (“IP”) networks.

125. The *Notices* also sought information to allow the Commission to evaluate horizontal concentration in the video marketplace, vertical integration between programming distributors and programming services, technical issues, including equipment and emerging services, and developments in foreign markets.

7. XM-Sirius Merger

126. The merging companies voluntarily committed to lease 4 percent of full-time audio channels to qualified entities and an additional 4 percent of capacity for the delivery of noncommercial educational and informational (“NCE”) programming, in order to enhance the diversity of programming available to consumers.²⁰³

¹⁹⁸ *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, MB Docket 09-52, Notice of Proposed Rulemaking, 24 FCC Rcd 5239 (2009).

¹⁹⁹ On February 3, 2010, the Commission adopted a First Report and Order that gives Tribes a priority to obtain broadcast radio licenses in Tribal communities. *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, MB Docket 09-52, First Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 1583 (2010). The Order provides an opportunity for Tribes to establish new service specifically designed to offer programming that meets the needs of Tribal citizens.

²⁰⁰ Pub. L. No. 102-385, 106 Stat 1460 (1992) (“1992 Cable Act”).

²⁰¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Notice of Inquiry, 24 FCC Rcd 750 (2009).

²⁰² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Supplemental Notice of Inquiry, 24 FCC Rcd 4401 (2009).

²⁰³ In May 2010, the parties received an extension from the Commission to fulfill the qualified entities commitment. *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings, Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Order, 25 FCC Rcd 5675 (2010) (granting extension until August 23, 2010). On October 18, 2010, the Commission adopted an *Order* providing details on the implementation of the qualified entities commitment to promote access for new entrants and more diverse

(continued....)

127. The *Memorandum Opinion and Order and Report and Order*²⁰⁴ also required the companies to refrain from entering into any agreement that would grant an equipment manufacturer an exclusive right to manufacture, market, and sell Satellite Digital Audio Radio Service (SDARS) receivers. In addition, the companies committed to refrain from barring any manufacturer from including in any receiver non-interfering hybrid digital terrestrial radio functionality, iPod compatibility, or other audio technology. In addition, the applicants commit to make available the intellectual property needed to allow any device manufacturer to develop equipment that can deliver SDARS. These requirements sought to eliminate barriers to the development and sale of SDARS equipment, including by small businesses and entrepreneurs.

128. On August 28, 2008, the Commission released a *Notice of Inquiry*²⁰⁵ on the issues of (i) requiring devices capable of receiving SDARS to include digital audio broadcast (“DAB”), or HD Radio™, or any other technologies capable of providing audio entertainment services; and (ii) requiring devices capable of receiving HD Radio to include SDARS or any other technologies capable of providing audio entertainment services. The *Notice of Inquiry* asked whether these requirements would further promote competition among audio technologies or add to the diversity of programming available to consumers through one device, both of which could lower barriers to market entry by small businesses.²⁰⁶

8. Low Power Radio Service

129. On November 27, 2007, the Commission adopted a *Third Report and Order and Second Further Notice of Proposed Rulemaking* regarding the low power radio service.²⁰⁷ The *Report and Order* allowed the transfer of LPFM licenses, reinstated the Commission’s rule that all LPFM authorization holders be local to the community and limits ownership to one station per licensee, encouraged voluntary time-sharing agreements between applicants and imposed an application cap on 2003 FM translator window filers.

130. In the *Second Notice of Proposed Rulemaking*, the Commission sought comment on technical rules that could potentially expand LPFM licensing opportunities. The *NPRM* tentatively concluded that full service stations must provide technical and financial assistance to LPFM stations when implementation of a full service station facility proposal would cause interference to an LPFM station.

131. LPFM service is vital to local/community radio and LPFM stations are often easier to launch by new entrants than full power stations. Accordingly, the Commission’s efforts to expand LPFM service and ownership opportunities increase opportunities for new entrants in radio.

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programming. *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings, Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order, 25 FCC Rcd 14779 (2010). On November 23, 2010 Sirius XM made the application process for the set-aside channels public on its website www.siriusxm.com/qualifiedentity. Media Bureau Announces Location of Application Procedures for Implementation of the Sirius XM Leasing Condition, Public Notice, 25 FCC Rcd 16210 (MB 2010).

²⁰⁴ *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings, Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (2008).

²⁰⁵ *Development of Devices Capable of Supporting Multiple Audio Entertainment Services*, MB Docket No. 08-172, Notice of Inquiry, 23 FCC Rcd 13178 (2008).

²⁰⁶ *Id.* at para. 6.

²⁰⁷ *Creation of a Low Power Radio Service*, MB Docket No. 99-25, Third Report and Order and Second Notice of Proposed Rulemaking, 22 FCC Rcd 21912 (2007).

9. Localism

132. On December 18, 2007, the Commission adopted a *Report and Notice of Proposed Rulemaking* geared towards increasing local programming content and diversity in communities across America.²⁰⁸ The item is based, in part, on six field hearings conducted throughout the country and over 83,000 comments.

133. In the *Report*, the Commission agreed to investigate ways to assist prospective radio licensees to identify suitable available commercial FM spectrum in the communities in which they wish to broadcast, including authorizing the development of software to do so.²⁰⁹ This tool was made available to the public on April 24, 2008.²¹⁰

134. The *Localism NPRM*, in part, concluded that qualified LPTV stations should be granted Class A status, which would require them to provide 3 hours per week of locally-produced programming and sought comment on this proposal. This and other proposals in the *NPRM* were designed to expand broadcast ownership opportunities for minority- and women-owned businesses and small businesses.

10. Leased Access Programming

135. On November 27, 2007, the Commission adopted an *Order* that, among other things, created specific customer service standards that cable operators must abide by when dealing with requests for leased access from independent programmers and increased enforcement of those standards.²¹¹ By adopting these new standards the Commission sought to facilitate the use of leased access channels on cable systems, providing an easier way for independent programmers to gain access to cable distribution. This *Order* was stayed by the Sixth Circuit Court of Appeals on May 22, 2008.²¹²

G. Consumer & Governmental Affairs Bureau

1. Slamming

136. Section 258 of the Act prohibits any telecommunications carrier from submitting or executing an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service, a practice known as "slamming."²¹³ In December 2007, the Commission adopted an order revising its requirements concerning verification of a consumer's intent to switch carriers.²¹⁴ These revisions: 1) ensure that each verification includes the date; 2) expand the disclosure obligations of third party verifiers when consumers have questions during the verification; and 3) clarify the required disclosures by verifiers to ensure that consumers better comprehend precisely what service changes they are approving.

137. Not only were these rule changes designed to increase consumer confidence in their ability to switch carriers seamlessly, they also provide carriers greater protections against losing

²⁰⁸ *Broadcast Localism*, Report and Notice of Proposed Rulemaking, MB Docket No. 04-233, 23 FCC Rcd 1324 (2008).

²⁰⁹ *Id.* at 1380.

²¹⁰ <http://www.fcc.gov/mb/audio/allotmentfinder.html>.

²¹¹ *Leased Commercial Access*, Report and Order, FCC 07-208, 23 FCC Rcd 2909 (2008)

²¹² *Order, United Church of Christ Office of Communications, Inc. v. FCC*, No. 08-3245 (and consolidated cases) (6th Cir. May 22, 2008).

²¹³ *See* 47 U.S.C. § 258(a).

²¹⁴ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Fourth Report and Order, 23 FCC Rcd 493 (2008) (*Slamming Fourth Report and Order*).

customers to slams. In both facilitating consumers' ability to switch carriers but protecting against unauthorized switches, the *Slamming Fourth Report and Order* eliminated barriers to entry by small telecommunications carriers. In addition, these revisions may have decreased the administrative costs for carriers to comply with the Commission's anti-slamming rules, thereby potentially removing another barrier to market entry for smaller businesses.

2. Telecommunications Relay Service

a. Commission Certification of New IP-Based Relay Providers

138. The Commission's rules provide that by being certified by the Commission, IP-based TRS providers may become eligible for reimbursement from the TRS Fund for their provision of services.²¹⁵ The certification of IP-based TRS providers is one area where the regulations and policies of the Commission have a direct bearing on the ability of small businesses to enter the TRS market. Although the certification rules were adopted before the period under consideration in this *Report*,²¹⁶ 14 providers have applied to the Commission for certification since the beginning of 2007.

139. While these certification processes facilitate market entry by small businesses, in addressing certification issues the Commission also must balance encouraging innovation and competitiveness from new companies with retaining control over the process to assure quality of service and safeguard the integrity of the TRS Fund. Thus, in 2008 the Consumer and Governmental Affairs Bureau (CGB) clarified that in the event of a merger or acquisition of one TRS provider by another, the acquiring or surviving provider must be certified under the Commission's rules (or otherwise eligible for compensation from the TRS Fund) before it can receive payments from the TRS Fund.²¹⁷ In addition, early in 2009, the Commission received a petition to amend its certification rules (1) to prohibit the practice of providing "white label" services by uncertified entities receiving compensation from the TRS Fund through certified providers, and (2) to require applicants for certification by the Commission to demonstrate sufficient resources and capabilities to provide an IP-based TRS service. The Commission has sought public comment on the petition.²¹⁸ These examples illustrate that while the Commission actively has taken steps to identify and eliminate barriers to TRS market entry for small businesses, it also must evaluate whether some criteria for entry should be more stringent to assure quality of service and safeguard the integrity of the TRS Fund.

b. Provider Compensation from the TRS Fund

140. TRS providers are compensated for their services based on per-minute rates, determined annually. Eligible providers submit their minutes each month for payment. Because TRS is an accommodation required by the Americans with Disabilities Act,²¹⁹ the compensation rates are intended

²¹⁵ See 47 C.F.R. §§ 64.604(c)(5)(iii)(F)(4), 64.606. Though these rules specifically refer to Video Relay Service (VRS) and IP Relay providers, the Commission also permitted IP Captioned Telephone Service providers to be certified by the Commission. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Internet-based Captioned Telephone Service*, CG Docket No. 03-123, Declaratory Ruling, 22 FCC Rcd 379 (2007).

²¹⁶ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Order on Reconsideration, 20 FCC Rcd 20577 (2005).

²¹⁷ *Consumer and Governmental Affairs Bureau Clarifies the Transferability of Telecommunications Relay Service (TRS) Provider Certification*, CG Docket No. 03-123, Public Notice, 23 FCC Rcd 10438 (CGB 2008).

²¹⁸ *Pleading Cycle Established for Comments on Petition for Rulemaking filed by GoAmerica, Inc., Concerning Internet-Based Telecommunications Relay Service (TRS) Provider Certification Requirements*, CG Docket No. 03-123, RM No. 11512, Public Notice, 24 FCC Rcd 3638 (CGB 2009).

²¹⁹ Title IV of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 401 (1990), added section 225, 47 U.S.C. § 225, to the Act.

to reflect the providers' reasonable costs of providing services. They are not set by market forces.²²⁰ In 2007, the Commission released a comprehensive order addressing issues related to cost recovery methodologies and compensation from the TRS Fund for all of the various forms of TRS.²²¹ Given that the Commission has continued to receive numerous applications for provider certification since its issuance of the *2007 TRS Rate Methodology Order*, the Commission concluded that the cost recovery methodologies adopted therein have not acted as barriers to TRS market entry for small businesses.

141. Also in the *2007 TRS Rate Methodology Order*, the Commission added an additional amount to the Speech-to-Speech (STS) services compensation rate for outreach efforts, noting that many potential STS users have not been made aware of the availability of STS. The Commission also required that STS providers file a report annually with NECA and the Commission on their specific outreach efforts directly attributable to the additional support for STS outreach.²²² Since STS providers are compensated an additional amount for outreach, the Commission concluded that requiring STS providers to file an annual report will not be a barrier to market entry for small entities.²²³

142. As with the provider certification process, the Commission also must balance encouraging broad participation in the TRS market, with its unique characteristics, with safeguarding the integrity of the TRS Fund. This balancing has particularly been an issue with respect to Video Relay Service (VRS). In the *2007 TRS Rate Methodology Order*, the Commission adopted a tiered rate approach for VRS, based on certain monthly service minutes thresholds, to more accurately correlate the compensation rates to providers' reasonable actual costs of providing service.²²⁴ In mid-2009, however, based on the experience with two VRS rate cycles since adoption of the *2007 TRS Rate Methodology Order*, the Commission questioned whether the VRS rules adopted in that order accurately reflect the providers' reasonable actual costs of providing service. Therefore, the Commission sought comment on whether it should adopt new rates for the 2009-2010 Fund year, rather than those prescribed by the *2007 TRS Rate Methodology Order*.²²⁵ Though VRS compensation rates may have an impact on the number of new entities, including small businesses, that seek to become new VRS providers, we did not believe that the 2009 proposals would erect barriers to market entry.²²⁶

²²⁰ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140, 20144, para. 5 (2007) (*2007 TRS Rate Methodology Order*) remanded on other grounds, *Sorenson Communications v. FCC*, 567 F.3d 1215 (10th Cir. 2009).

²²¹ See generally *2007 TRS Rate Methodology Order*.

²²² *Id.* at 20166, para. 61.

²²³ *Id.* at 20189, App. G, Final Regulatory Flexibility Certification at para. 121.

²²⁴ *Id.* at 20160-65, 20167-68, paras. 47-56, 67-72.

²²⁵ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Public Notice and Notice of Proposed Rulemaking, 24 FCC Rcd 6029, 6033, para. 11 (2009).

²²⁶ In 2010, the Commission also launched a proceeding to take a fresh look at the Commission's VRS rules, including questions on the structure of the VRS market. See *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Notice of Inquiry, 25 FCC Rcd 8597, 8598, 8606, paras. 1, 27 (2010). At the same time, the Commission adopted interim VRS rates for the 2010-2011 Fund year, representing the average of the previous tiered rates and proposed rates based on actual, historical costs. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 25 FCC Rcd 8689, 8690, para. 2 (2010).

c. Application of E911 Regulations to TRS Providers

143. Because of the importance of prompt emergency call handling for all Americans, the Commission adopted emergency call handling requirements for Internet-based TRS providers. In March 2008,²²⁷ the Commission adopted interim measures to ensure that persons using Internet-based forms of TRS could promptly access emergency services, pending the development of a technological solution that would permit Internet-based TRS providers to immediately and automatically place the outbound leg of an emergency call to an appropriate public safety answering point or other appropriate entity. Later in 2008, the Commission adopted a system for assigning users of VRS and IP Relay ten-digit telephone numbers linked to the North American Numbering Plan, and required users to register their physical location so that the relay provider can automatically pass this location information to appropriate emergency personnel.²²⁸ To the extent that Internet-based TRS providers, including small entities, will be eligible to receive compensation from the TRS Fund for their reasonable costs of complying with these requirements, the Commission found that these requirements will not be a barrier to market entry for small entities.²²⁹

3. Application of Section 255 to Interconnected VoIP Services

144. In June 2007, the Commission extended the disability access requirements, that have applied to telecommunications service providers and equipment manufacturers under section 255 of the Act,²³⁰ to providers of interconnected VoIP services and to manufacturers of specially designed equipment used to provide those services.²³¹ In addition, the *Order* extended the TRS requirements to providers of interconnected VoIP services. The Commission took these measures to ensure that, as more consumers migrate from traditional phone service to interconnected VoIP services, the disability access provisions mandated by Congress under sections 255 and 225 will apply to and benefit users of interconnected VoIP services and equipment. In applying section 255 to interconnected VoIP providers and equipment manufacturers, the Commission adopted the “readily achievable” standard that applies to telecommunications service providers and manufacturers. Therefore, interconnected VoIP providers and manufacturers are required to render their services or products accessible only if doing so is “easily accomplishable and able to be carried out without much difficulty or expense.”²³² Applying section 255 to interconnected VoIP providers and equipment manufacturers in this manner balanced the disability

²²⁷ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123 and WC Docket No. 05-196, Report and Order, 23 FCC Rcd 5255 (2008) (*Interim Emergency Call Handling Order*).

²²⁸ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 11591 (2008) (*First TRS Numbering Order*); Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791 (2008).

²²⁹ See *First TRS Numbering Order*, 23 FCC Rcd at 11661, App. C, Final Regulatory Flexibility Certification at para. 3; *Interim Emergency Call Handling Order*, 23 FCC Rcd at 5278, App. C, Final Regulatory Flexibility Certification at para. 3.

²³⁰ 47 U.S.C. § 255.

²³¹ *IP-Enabled Services*, WC Docket No. 04-36; *Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123; *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275 (2007).

²³² *Id.* at 11335, App. C, Final Regulatory Flexibility Analysis at para. 81.

access policies underlying section 255 with the market access for small businesses policies – in this case, small VoIP providers or equipment manufacturers – underlying section 257.

4. Closed Captioning

145. Closed captioning allows persons with hearing disabilities to have access to television programming by displaying the audio portion of a television program as text on the television screen. In November 2008, the Commission sought comment on the closed captioning obligations of digital broadcasters that choose to use their digital channel to transmit several streams of programming, known as “multicasting.” Specifically, the Commission sought comment on the scope in a multicasting environment of section 79.1(d)(12) of the Commission’s rules, which exempts from the closed captioning obligations video programming channels that produced annual gross revenues of less than \$3 million during the previous calendar year.²³³ In order to determine whether each stream of a digital broadcaster’s multicast operation must be captioned, the Commission proposed several possible alternatives, including: treat each multicast stream as a separate channel and calculate their revenues separately; treat each multicast stream as a separate channel and calculate their revenues separately, but decrease the revenue threshold for determining whether the non-main programming streams must close caption; treat individual programming streams as one channel, in which case the revenues would be aggregated for purposes of determining if the exemption in section 79.1(d)(12) applies; or, impose a new non-revenue approach for deciding how much programming must be captioned on multicast streams.

146. The Commission’s rules – and the Act itself – acknowledge that there are economic commitments associated with closed captioning requirements, and that the Commission must balance “maximize[ing] the accessibility of video programming”²³⁴ with ensuring that the requirements do not result in an undue economic burden on video providers and programmers.²³⁵ By its very nature, current section 79.1(d)(12) decreases the closed captioning burden on entities whose annual gross revenues do not meet a certain threshold. Therefore, how the Commission interprets section 79.1(d)(12) in the multicasting environment likely will have an effect on market entry by small broadcasters. Even if the Commission adopts a more stringent threshold for section 79.1(d)(12), however, which could result in increased barriers to entry for small broadcasters, at the same time, the greater amount of captioning that concomitantly would be required may provide business opportunities for software developers and other small businesses performing closed captioning services.

5. Market Entry in Indian Country

147. The Commission, through CGB’s Office of Native Affairs and Policy and assisted by other Bureaus, conducts outreach to Tribal Nations on an ongoing basis, with emphasis on increasing

²³³ *Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers*, CG Docket No. 05-231, ET Docket No. 99-254, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, 23 FCC Rcd 16674, 16687-89, paras. 35-40 (2008) (*Closed Captioning 2008 Order and NPRM*). See 47 C.F.R. § 79.1(d)(12). In the accompanying Declaratory Ruling and Order, the Commission clarified some of the closed captioning rules in light of technological changes inherent in the digital television transition for full-power broadcasting, and amended the rules to provide for more efficient complaint processes and methods for consumers to contact distributors with concerns about closed captioning. See generally *Closed Captioning 2008 Order and NPRM*.

²³⁴ 47 U.S.C. § 613(b)(2).

²³⁵ See, e.g., 47 U.S.C. § 613(d)(1) (empowering Commission to adopt categorical exemptions to the closed captioning requirements where captioning would be economically burdensome); 47 U.S.C. § 613(e) (enabling Commission to exempt programming on a case-by-case basis where compliance with the closed captioning requirements would result in an undue economic burden); 47 C.F.R. § 79.1(f) (Commission rules implementing 47 U.S.C. § 613(e); 47 C.F.R. § 79.1(d)(9) (exempting from the closed captioning requirements programming on new networks, for the first four years after the network begins operation).

telecommunications access and market entry in Indian Country.²³⁶ For the period 2007-09, the Commission continued to sponsor "Indian Telecommunications Initiative" (ITI) workshops in Indian Country to provide "how to" information on telecommunications services and infrastructure, and to promote government-to-government dialogue and consultation. Beyond the ITI workshops, Commission staff regularly meet with representatives of individual tribes to address their unique telecommunications and related issues. Commission staff also participate in several dozen conferences each year sponsored by Tribal and related organizations to provide additional opportunity to help advise potential new market entrants, including small businesses, that are interested in serving Indian country.

148. In addition, the Tribal Lands Bidding Credit (TLBC), which is codified at section 1.2110(f)(3) of the Commission's rules, remains available in Commission spectrum auctions to provide greater incentives for deployment of wireless services to Tribal Lands.²³⁷ Though the Commission's rules also provide for spectrum auction bidding credits specifically for entities that qualify as small businesses,²³⁸ these TLBCs can act as supplemental vehicles to eliminate barriers to market entry for small businesses. Since January 2007, four licensees have received TLBCs for seven licenses to provide service to five different Tribal Lands.²³⁹

H. Enforcement Bureau

149. Since its inception in 1999, the Enforcement Bureau has taken a number of steps to reduce barriers to entry for small businesses. The Enforcement Bureau has made it easier and less costly for small businesses to bring anti-competitive behavior to the Commission's attention, and to resolve disputes with other carriers. The Commission has taken strong enforcement action to deter illegal, anti-competitive behavior on the part of the largest carriers. And, when small businesses themselves are the targets of enforcement actions, the Commission has tailored monetary forfeitures to their size.

1. Complaint Mediation

150. To expedite problem solving among common carrier industry participants, the Enforcement Bureau's Market Disputes Resolution Division engages in informal mediation of most formal complaints and pre-complaint disputes. This type of alternative dispute resolution facilitates private resolution, obviating the need for costly litigation. This also frees Commission resources for unresolved disputes that result in formal complaints, and, therefore, reduces the average amount of time it takes the Commission to decide those complaints. From January 2007 to December 2009, the Enforcement Bureau assisted the parties in resolving over sixty matters informally, including eighteen mediation sessions at the Commission with parties and lawyers present. Roughly three-quarters of the matters settled as a result of staff involvement.

²³⁶ Prior to the Commission's establishment of the Office of Native Affairs and Policy, see *Establishment of the Office of Native Affairs and Policy in the Consumer and Governmental Affairs Bureau*, Order, 25 FCC Rcd 11104 (2010), CGB's Office of Intergovernmental Affairs led the Commission's outreach to Tribal Nations.

²³⁷ See 47 C.F.R. § 1.2110(f)(3). Notably, section 1.2110(f)(3)(ii)(3) also provides specifically that the government of the Tribal land being served may not enter into an exclusive contract with the applicant receiving the TLBC that precludes entry by other carriers, and may not unreasonably discriminate among wireless carriers seeking to provide service on the Tribal land.

²³⁸ See 47 C.F.R. § 1.2110(f)(2).

²³⁹ All of the TLBCs were awarded in Auction No. 73, the 700 MHz Band Auction. Awardees were Data-Max Wireless, LLC, for serving the Hualapai Tribes of Peach Springs, Arizona (call sign WQJQ674); LL License Holdings, LLC, for serving the Santee Sioux of Nebraska Reservation and the Rosebud Sioux Tribe of South Dakota (call signs WQKH490 and WQKH491); NSIGHTTEL WIRELESS, LLC, for serving the Hannahville Potawatomi Indian Village of Green Bay, Wisconsin (call sign WQJZ318); and SAL Spectrum, LLC, for serving the Navajo Nation of Arizona, New Mexico, and Utah (call signs WQJQ808, WQJQ809, and WQJQ810).

2. Pole Attachments

151. Section 224 of the Act²⁴⁰ authorizes the Commission to regulate the rates, terms, and conditions imposed by utilities on cable or telecommunications attachments to utilities' poles in order to assure that such rates, terms and conditions are just and reasonable. The Bureau's enforcement of this provision thus ensures that small, competing carriers obtain the necessary access to utilities' poles on a non-discriminatory basis. From January 2007 to December 2009, the Enforcement Bureau handled twelve pole attachment complaints in which CLECs or cable companies challenged either denial of access to poles, or the rates for attachments. Eight of those disputes were resolved or settled during the reporting period.²⁴¹

3. Investigations

152. The Enforcement Bureau investigates allegations of anticompetitive or discriminatory conduct by telecommunications carriers, which could result in barriers to market entry by small competitors. The Enforcement Bureau designs these investigations to identify, correct, and deter violations of the Communications Act and the Commission's rules through monetary forfeitures and other enforcement tools. The investigations also enable the Enforcement Bureau to spot significant industry problems and identify bad actors, without the filing of formal complaints.

4. Forfeitures

153. Finally, in determining the amount of monetary forfeitures to impose on small businesses, the Commission applies section 503(b)(2)(E) of the Act, which requires the Commission to consider a target's ability to pay.²⁴² The Commission reduced proposed forfeitures on this basis in numerous cases. This analysis includes applications, as necessary, of Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which requires, *inter alia*, that federal agencies establish a "policy or program . . . to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity."²⁴³ Since 2008, the Enforcement Bureau has issued no *Notices of Apparent Liability* to companies that claimed small entity status under the SBREFA.

IV. LEGISLATIVE PROPOSALS

154. Section 257(c)(2) requires the Commission to propose legislative initiatives which identify statutory market entry barriers that Congress may take action to eliminate, consistent with the public interest, convenience, and necessity.²⁴⁴

1. New Tax Incentive Program

155. We propose that Congress adopt a new tax incentive program that would authorize the provision of tax advantages to eligible companies involved in the sale of communications businesses to small firms, including those owned by women and minorities. The proposed program could permit deferral of the taxes on any capital gain involved in such a transaction, as long as that gain is reinvested in one or more qualifying communications businesses. The proposed program could also permit tax credits for sellers of communications properties who offer financing to small firms. Additional conditions might

²⁴⁰ 47 U.S.C. § 224.

²⁴¹ A ninth dispute was settled after December 2009, and the others remain pending.

²⁴² 47 U.S.C. § 503(b)(2)(E); see *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17,087, 17,101, para. 27 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (*Policy Statement*); 47 C.F.R. § 1.80(b)(4), Note to (b)(4).

²⁴³ Pub. L. No. 104-121, 110 Stat. 847 (1996); see *Policy Statement*, 12 FCC Rcd at 17,109, paras 51-52.

²⁴⁴ 47 C.F.R. § 257(c)(2).

include restrictions on the size of the eligible purchasing firm, a minimum holding period for the purchased firm, and a cap on the total value of eligible transactions. The provision of tax advantages has proven to encourage the diversification of ownership and to provide opportunities for entry into the communications industry for small businesses, including disadvantaged businesses and businesses owned by minorities and women.

V. CONCLUSION

156. With this *2009 Triennial Report*, the Commission has detailed actions taken during the last three years to enact rules which have the effect of lessening or eliminating market entry barriers for entrepreneurs and small telecommunications businesses. In so doing, we have sought to meet our mandate under Section 257. We continue to strive towards the goal embodied in the statute, to promote policies favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

157. We hereby submit this *2009 Triennial Report* to Congress.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

RE: *Section 257 Triennial Report to Congress Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*

I am pleased that the Commission has voted out its Section 257 report, which addresses some of the FCC's highest priorities: unleashing entrepreneurship, supporting small businesses and spurring our economy.

Two facts highlight why the FCC's efforts to remove barriers to new entrants in the communications space are important to our economy.

First, the information and communications technology sector is a significant and growing part of our economy, generating more than a trillion dollars a year in economic activity. In 2010, the tech sector grew twice as fast as the U.S. economy, and analysts project the same will be true in 2011.

Second, small businesses, and new entrants in particular, are the key drivers of net job creation in the United States. Since 1980, nearly all net job creation in the United States came from businesses that are less than five years old. From 1977 to 2005, existing firms have lost jobs on average, while new firms have added 3 million jobs a year.

This report looks at the FCC's efforts from 2007 to 2009 to remove barriers to new entrants and small businesses in the communications sector. I am pleased to report that it does a more comprehensive job than previous iterations of providing information that may be useful to policymaking. I fully expect, nonetheless, that our next report will build on these advances and drive our approach to removing barriers to small businesses in the years to come.

As important as the 257 Report is, encouraging a diversity of voices, promoting entrepreneurship and fostering the growth of small businesses aren't just things we think about once every three years when it comes time to assemble a report. They are core principles shaping our strategic direction every day. I look forward to our continued work together on these important issues in the months ahead.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, CONCURRING IN PART**

RE: Section 257 Triennial Report to Congress; Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses

We recently celebrated the 15th Anniversary of the 1996 Telecommunications Act. While there is plenty to celebrate in terms of the innovation and technology that has blossomed since then, there is much less to celebrate in terms of accomplishments related to our Section 257 mandate. Too often, over the years, the Commission has actually gone in the wrong direction. Hopefully those days are past. Congress recognized the significance that barriers to entry could have on our telecommunications and media environments, but the FCC for many years instead spent an inordinate time actually erecting barriers by blessing out-of-control media consolidation and running away from our public interest oversight responsibilities.

It is increasingly important that the Commission have a strategic plan to eliminate barriers, because issuing a report every three years to Congress with a list of limited, isolated and non-strategic steps is not what the times demand. While each such little step may be well-intentioned, such an approach does not substitute for a viable program that promotes market entry for small businesses and entrepreneurs.

Vice President Al Gore hit the nail on the head at the bill signing of the '96 Act, "If we do not see to it that every project, every network, every system addresses the public interest at the beginning, then when will it be addressed?" We are failing to meet our statutory requirements when the public interest does not stand at the forefront as our guiding principle.

I wish I could say that the Act had been implemented over the years in such a way as to foster a media environment with more diverse ownership, more local content, more independent production, and more competition. But statistics tell the opposite story. We have witnessed a 39% drop in the number of owners of radio stations in the last 15 years. Similar consolidation shrunk television. In 2010, there were 150 fewer owners of commercial TV stations—a 33% decrease. And, while 34% of the U.S. population consists of minorities, only about 3% of full-power commercial TV stations and 7.7% of radio stations are minority-owned.

Congress gave us some pretty clear media goals in 1996, telling the FCC to promote "diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity." We have certainly seen some incredible technological advancement, but we have for years fallen far short in delivering on the diversity, competition, and public interest parts of our charge.

I am pleased that in the report before us we have identified some of the main barriers. This report represents an improvement over previous iterations, and I hope that we will use it to begin a frontal assault on barriers that are holding too many Americans--individuals and businesses--back. In this, we will be judged by concrete actions. Now is the time for action. Our media and telecommunications landscape, our civic dialogue, and our country will be better off when we reduce the barriers confronting minorities, women and small businesses as Congress directed us to do fifteen years ago.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: Section 257 Triennial Report to Congress; Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses

While I support this item in large part because it identifies actions the Commission completed for the three-year period prior to December 31, 2009, I believe that the Commission can do a better job of complying with the directives of Section 257, and in reporting about the actions it has taken to meet those directives.

I take seriously the mandate of Section 257 for the Commission to identify and eliminate market entry barriers for small businesses, and to promote policies “favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.” The Commission, however, can do more to comply with the Section 257 requirement of identifying regulations that can be prescribed to eliminate market entry barriers for small businesses. I expect that future Reports will evidence additional progress for achieving the purposes underlying Section 257 and provide more detail in describing how the Commission’s actions have fulfilled those purposes, and set forth, where appropriate, specific examples and data that support the Report’s conclusions.

This Commission, as evidenced by Chairman Genachowski’s leadership during the National Broadband Plan proceeding, is on the right track for satisfying our obligations. The Commission already has taken a number of initiatives that are in compliance with both the language and spirit of Section 257. For example, during the National Broadband Plan proceeding, the Office of Communications and Business Opportunities (OCBO), led by Director Thomas Reed, held several workshops to connect small businesses and entrepreneurs with financial experts, is developing tools to assist those entities with obtaining investment capital, and is creating online networking programs for these entities so they can connect with other businesses. In addition, OCBO is working with the Small Business Administration and Service Corps of Retired Executives (SCORE) to encourage public-private partnerships to help small businesses adopt broadband, including increasing their digital literacy and e-commerce skills in low-income areas as recommended in the National Broadband Plan, and is producing an online guide to help inform small business owners about what informational assistance the Commission has available for new entrants.

I expect that the next Triennial Report will recount the Commission’s actions to implement the National Broadband Plan and promote open access to the Internet. Small businesses are vital to our communications industry and our Nation’s prosperity. No one can doubt that the Internet offers a significant opportunity for small businesses and entrepreneurs to showcase their products and services to the public. President Obama has said that the Internet is “vital infrastructure” and “has become central to the daily economic life of almost every American.” The U.S. Congress also recognized the significance of the Internet when it charged the Commission with developing our National Broadband Plan to ensure that high-speed Internet is available to all Americans. And without access to high-speed Internet, small businesses, new telecommunications entrants, and entrepreneurs will find it harder and harder to survive.

A number of the recommendations in the National Broadband Plan, if adopted, will lead to further deployment and adoption of broadband throughout the Nation. An Internet that is available and accessible to all has significant potential to improve the economic lives of many,

including small businesses, entrepreneurs, minorities, and women. I believe the Internet is the great equalizer for minorities and women who have struggled for a foothold in traditional media and other businesses. I am determined that the next Triennial Report will describe the Commission's actions to help small businesses and entrepreneurs benefit from the specific recommendations in the National Broadband Plan to promote their interests, as well as the general recommendations to improve availability and accessibility of high-speed Internet throughout the Nation.

The next Triennial Report should also show that we have not ignored the needs of communities for traditional media sources to address their diverse local interests. Mass media, whether TV or radio, off-air or via subscription, is still a significant source of news, entertainment, and emergency information for millions of Americans. It remains critically important to have opportunities for new, small, and diverse entrants in traditional media as on-air talent, creative forces, editorial voices, vendors, distributors, and owners. I am optimistic that the Commission's forthcoming actions in the Quadrennial Ownership Review, as well as in mergers and acquisitions that require our review will reflect this recognition and concern.

I urge my fellow Commissioners, and the talented staff of the Commission, to keep the goals of Section 257 in mind as we move forward. These goals should not be an afterthought as we develop our national communications policies. I believe the purpose of Section 257 is to ensure that we incorporate these goals in Commission policies, rules, and decisions as they are developed and implemented. This way, we can then look forward to an impressive recounting of actions the Commission has taken to promote policies that advance the interests of small businesses and entrepreneurs in the next 257 Triennial Report.